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United States
Circuit Court of Appeals
For the Ninth Circuit.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Plaintiff in Error,

vs.

TONY POSSUS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

No. 2949

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

LYONS and RITCHIE, Valdez, Alaska,

Attorneys for Plaintiff and Defendant in Error.

DONOHOE and DIMOND, Valdez, Alaska,

W. S. BONNIFIELD, Valdez, Alaska,

Attorneys for Defendant and Plaintiff in Error.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Bill of Exceptions.

Comes now the above-named defendant, the Ellamar Mining Company of Alaska, a corporation, and being about to prosecute a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit from the Judgment made and entered herein by the above-named court on the 9th day of January, 1917, and files herein and petitions and prays said above-named court to settle and sign and have made a part of the record upon such Writ of Error, the hereinafter mentioned exceptions, all of which appear of record herein and are hereinafter fully set forth;

defendant's said Bill of Exceptions on such Writ of Error to consist of the following records, files, papers and proceedings, filed, had and done herein, to wit:

Plaintiff's Third Amended Complaint;

Defendant's Demurrer to Plaintiff's Third Amended Complaint;

Minute Order of Court Overruling Defendant's Demurrer to Plaintiff's Third Amended Complaint; said minute order being made and entered on the 28th day of December, 1916, entered Court Journal II, page 84;

Defendant's Answer to Plaintiff's Third Amended Complaint;

Plaintiff's Motion to Strike Parts of Defendant's Answer;

Order of Court Striking Parts of Defendant's Answer;

Defendant's Amended Answer to Plaintiff's Third Amended Complaint;

Plaintiff's Reply;

Journal Record of Proceedings Had at Trial, Court Journal II, pages 97 to 100, inclusive;

Certified Transcript of Record of Evidence and Proceedings at Trial by the Court Reporter;

Verdict and Special Finding of Jury;

Motion of Defendant for Judgment in Its Favor Notwithstanding the Verdict of the Jury;

Minute Order Denying Motion of Defendant for Judgment Notwithstanding the Verdict, entered the 9th day of January, 1917, entered Court Journal II, page 106;

Motion for New Trial by Defendant;

Minute Order of Court Denying Defendant's Motion for New [1*] Trial, made the 9th day of January, 1917, entered Court Journal No. II, page No. 106;

Remittitur of Part of Verdict by the Plaintiff; Judgment;

Minute Order of Court Granting Defendant Until the 15th day of February, 1917, to Prepare, File and Settle Its Bill of Exceptions on Writ of Error; Court Journal No. II, page 107;

Order of Court Made the 13th Day of February, 1917; Enlarging Time for Preparing, Filing and Settling Bill of Exceptions Until March 10, 1917;

Order Settling and Certifying Bill of Exceptions.

DONOHUE & DIMOND, and
W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

Service of the foregoing proposed bill of exceptions and of all papers, records and proceedings therein named, by receipt of copy thereof acknowledged at Valdez, Alaska, this 16th day of February, 1917.

LYONS & RITCHIE,

Attorneys for the Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Third Amended Complaint.

Now comes the plaintiff and by leave of Court files this, his third amended complaint, and alleges:

I.

That defendant is a corporation organized under the laws of the State of Washington and doing business in Alaska. At all times hereinafter mentioned defendant was engaged in operating a copper mine at Ellamar, Alaska, in the Third Judicial Division of said territory.

II.

On or about January 12, 1916, and for about eight months prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100-foot level of said company's mine. At about eight o'clock P. M. he and another miner named Louis —, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another

part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the glory-hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started [3] the same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory-hole. In the contact of the car with said wall plaintiff was pinned under the car and sustained the following injuries, to wit, fracture of the right clavicle with separation limiting the motion of the right arm and shoulder; a severe bruise adjacent to the left eye which temporarily destroyed the sight so that the same was not fully restored for three months; a violent blow upon the jaw which badly bruised the same, knocked out one tooth, broke another tooth and partially paralyzed the use of the jaw for three months.

III.

Plaintiff alleges that at the time of suffering said injury he was a strong, healthy man, 33 years of age, an experienced and competent hard rock miner and experienced drill man, able to earn the highest wages paid for such work, and at that time was receiving four dollars a day from defendant for his work. He has a mother dependent upon him for support. He is unable to state, and is informed by competent surgical advice that surgical skill cannot determine positively to what extent, if any, his said injury caused permanent disability, but he believes that

the same caused total disability for at least six months, and permanent disability to the extent of at least one-third of his earning power, all to his damage fourteen hundred dollars (\$1400).

For a second cause of action against defendant corporation plaintiff alleges:

I.—II.

That he adopts as part of his second cause of action paragraphs I and II of his first cause of action and makes them paragraphs I and II of his second cause of action, as if they were reincorporated here. [4]

III.

Plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month had been deducted from his wages for hospital dues, which entitled him to care in a hospital and to competent surgical and medical attendance at the expense of defendant in case of his injury or illness arising in the course of his employment. Plaintiff alleges that after said accident he was taken to a house used by defendant as a hospital and kept there about twelve days, but no qualified surgeon or physician was in attendance upon him at any time, and no examination of his injuries was made or attempted to be made except by a woman who had charge of said hospital, one Mrs. Tramontine, who was not a physician or surgeon or even a trained nurse. He was assured by said woman that he had no injury except bruises on the flesh; that no bones were broken and that he would speedily recover

and soon be able to resume work. About twelve days after his said injuries were suffered he was ordered out of the hospital by the general foreman, one Gedney, although he was still very weak and ill and in no way recuperated from his said injuries and his bone fracture was entirely uncared for. He received no further care, attention or assistance from defendant, or any of its officers or agents. He alleges that during his stay in the hospital his injuries were not properly or sufficiently dressed and medicated and no care whatever was given to his broken clavicle. Plaintiff is advised by competent physicians and surgeons that owing to the lapse of time since the fracture of his clavicle occurred the bone can only be restored or partially restored by an expensive surgical operation, and that because of the lapse of time it is doubtful whether it can be restored to its former strength even by the necessary operation; that it is highly probable that the original injury to his shoulder is so greatly aggravated by the delay in rectifying [5] the same that it will never recover much of its former strength so that he can resume his former occupation, and that he may never be able again to perform gainful manual labor. At this time the fracture of said clavicle is ununited so that the separation limits the motion of the right arm and shoulder and prevents their use in the performance of manual labor or active physical exertion. Plaintiff alleges that because of the wilful failure and refusal of defendant to give him the timely and necessary surgical care to which he

was entitled as aforesaid he has suffered great physical pain and mental torture for a long time after he might have recovered as fully as the nature of his injury permitted, through proper surgical and medical care, and still suffers some pain from his said injury. That said unnecessary suffering has been due wholly to the gross negligence and the wilful failure and refusal of defendant to give him the surgical attention and medical attendance to which he was entitled as aforesaid, and his present impaired physical condition is largely due to the same gross and wilful negligence of defendant, and the aggravation of his disability beyond the normal result of his original injury is wholly due to that cause. At the time he suffered said injury he was a strong, healthy man, 33 years of age, an experienced and competent hard rock miner and experienced drill man, able to earn the highest wages paid for such work, and at that time he was receiving from defendant four dollars a day for his work.

IV.

Plaintiff alleges that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service which aggravated the result of his original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged fifteen thousand dollars (\$15,000). [6]

WHEREFORE, plaintiff asks judgment against defendant on his first cause of action for the sum

of fourteen hundred dollars; on his second cause of action for the sum of fifteen thousand dollars and for the costs of this action.

LYONS & RITCHIE.

United States of America,
Territory of Alaska,—ss.

Tony Possus, being duly sworn, says he is the plaintiff in this action; that he has read the foregoing third amended complaint and he believes the same to be true.

TONY POSSUS.

Subscribed and sworn to before me this 28th day of December, 1916.

[Seal]

JOHN LYONS,
Notary Public.

My commission expires November 27, 1920.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Defendant's Demurrer to Plaintiff's Third Amended Complaint.

Comes now the above-named defendant and demurring to plaintiff's third amended complaint for cause of demurrer, alleges:

I.

That it appears upon the face of the said third amended complaint that several causes of action have been improperly united in this:

(a) Plaintiff's first cause of action as set forth in his third amended complaint is an action *ex delicto*, having for its foundation an alleged tort of the defendant; and plaintiff's said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff's said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort as he nowhere alleges misfeasance on the part of the defendant in connection with said hospital contract, but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

(b) Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled, "An Act relating to the measure and recovery of compensation of injured employees in the

mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability [8] of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act.”

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common-law action as pleaded in plaintiff’s said second cause of action for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

(c) Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, of which the accident occurring in the defendant’s mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

II.

Defendant demurs to plaintiff’s second cause of action set forth in plaintiff’s third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant

for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause, and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. [9] The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth in said first cause of action. To permit the plaintiff to maintain his second cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer twice in damages for the same cause of action.

III.

The defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

Dated at Valdez, Alaska, this 28th day of December, 1916.

DONOHUE & DIMOND,
Attorneys for Defendant.

I hereby acknowledge service of the above and foregoing demurrer to plaintiff's third amended complaint, by receiving a copy thereof this 28th day of December, 1916.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 28, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Overruling Demurrer to Plaintiff's
Third Amended Complaint.**

Now on this day this demurrer came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond and W. S. Bonni-field appearing as attorneys for defendant, and after argument had, and the Court being fully advised in the premises,

IT IS ORDERED that said demurrer be, and the same is hereby overruled, to which ruling and order of the court defendant excepts and exception is al-

lowed, and defendant is given until December 29th, in which to answer and the plaintiff is given until December 30, 1916 in which to reply.

September 1916, Term—December 28th, 1916—
76th Court Day—Thursday.

Entered Court Journal No. II, page 84. [11]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Answer to Plaintiff's Third Amended Complaint.

Comes now the above-named defendant and for answer to plaintiff's third amended complaint admits, denies and alleges, as follows:

I.

Referring to the first paragraph of plaintiff's first cause of action, defendant admits the same.

II.

Referring to the second paragraph in plaintiff's first cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all or that

the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's first cause of action defendant admits that plaintiff is about 33 years of age and at the time of receiving said accident he was receiving from said defendant \$4 per day for his work and as to each and every other allegation in said paragraph contained, defendant denies the same. [12]

For a separate answer and by way of affirmative defense to plaintiff's first cause of action defendant alleges:

I.

The defendant admits that the plaintiff was in its employ on the 12th day of January, 1916, and on said day in the course of his employment, as a miner, met with an accident in which he received certain injuries consisting of bruises on his right shoulder, a bruise adjacent to his left eye and a bruise on his jaw but did not have his right clavicle broken; that on or about the 8th day of February thereafter, the defendant caused said plaintiff to be thoroughly examined by a competent physician and surgeon authorized to practice medicine under the laws of

Alaska who after such examination informed said plaintiff and informed the officers of said defendant in charge of the defendant's mining operations at Ellamar that said plaintiff was entirely recovered from said injuries; that from the time of said accident, to wit, the 12th day of January, 1916, until said examination, to wit, the 8th day of February, 1916, defendant furnished plaintiff with board and lodging and had his wounds properly dressed and cared for by a competent and experienced nurse; that shortly after said physician and surgeon notified said plaintiffs aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendants knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or about the 15th day of April, 1916, at which time the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, stating that plaintiff claimed compensation for the injury received in said accident, whereupon, the defendant on the 22d day of April, 1916, notified said plaintiff through his said attorneys that said defendant then had in its employ at Ellamar, [13] Alaska, a competent physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska and the said defendant requested plaintiff to immediately submit to an examination by said physician and sur-

geon for the purpose of ascertaining the extent of said alleged injuries, and then and there offered to provide plaintiff with free transportation and all expenses that plaintiff might be put to in going from Valdez to Ellamar and return; that said plaintiff absolutely refused to submit himself to such examination.

II.

That thereafter and on the 23d day of August, 1916, defendant again served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Mr. Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that sometime ago Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so. The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first class physician and surgeon.

The company now makes you the following offer, It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accomodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accomodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The company will also settle such claims in cash as you may be entitled to during the time you have [14] been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter, pursuant to the foregoing demand, plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practice medicine under the laws of the Territory of Alaska, and an X-Ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken

and used his right arm and shoulder freely and in such positions that had his right clavicle been broken it would have been impossible for him to have done so; but plaintiff did claim that his muscles about his clavicle and right arm were sore; the defendant thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars, and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever.

III.

Defendant alleges that plaintiff is not permanently injured in any degree whatever and is not suffering from any permanent disability whatever in any manner arising from the injuries received in said accident or of which the injuries received in said accident are the proximate cause; that the injuries received in said accident did not cause plaintiff a temporary disability for a period longer than three months and a half, which under the provision of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, would entitle [15] plaintiff to the sum of two hundred and ten dollars

for which amount the defendant hereby tenders plaintiff judgment.

IV.

Defendant further alleges that it has at all times since said accident and now is able, ready and willing to compensate plaintiff in accordance with the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, for any and all injuries he received by said accident or for any injury he now sustains of which the injuries received in said accident were the proximate cause.

Referring to plaintiff's second cause of action contained in plaintiff's third amended complaint, defendant admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's second cause of action, defendant admits the same.

II.

Referring to the second paragraph in plaintiff's second cause of action, defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder, or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all, and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's second cause of action, defendant admits that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month was deducted from his wages [16] for hospital dues, and defendant admits that at the time of the accident to plaintiff he was employed by defendant as a miner and was receiving \$4 per day for his work; defendant denies each and every other allegation in said paragraph contained except as the same is specifically admitted in the affirmative defense to plaintiff's said second cause of action.

IV.

Referring to the fourth paragraph of plaintiff's second cause of action, defendant denies each and every allegation therein contained.

For a separate answer and by way of affirmative defense to plaintiff's second cause of action defendant alleges:

I.

That at the time of said accident and for seven years prior thereto the defendant did not maintain a hospital at its mine at Ellamar, Alaska; that all the employees of said defendant, including this plaintiff, well knew that said defendant did not maintain a hospital at its said mine, and did not have a physician and surgeon in attendance at said mine, but for many years prior to said accident and at the time of said accident it was the custom and rule of said defend-

ant mining company to maintain at its mine at Ellamar certain medicines, liniments, bandages and other appliances for the purpose of giving first aid to injured employees, and for treating slight injuries that any of its employees might receive; that in case of serious injuries to any of its employees it was the rule and custom of said defendant to send its employees who were seriously injured to Valdez or Cordova for treatment by physicians and surgeons who might be practicing their profession at either of said places; plaintiff during all the time he was in defendant's employ and at the time of said accident knew of this rule and custom and at the time, the sum of \$1.50 per month was deducted from his wages, knew of this rule and custom, and knew that this would be the character and kind of medical aid and treatment he would receive should he meet with an accident while in defendant's employ. [17]

II.

That at the time of said accident and for a short time prior thereto the defendant, in order to better care for its employees, who were slightly injured and to better administer first aid to those who might be seriously injured, equipped a temporary hospital and employed a competent and experienced nurse, which said nurse was in attendance at the time of said accident. Immediately after said accident plaintiff was taken to said temporary hospital where his wounds and bruises were properly cleansed, medicated and bandaged, and plaintiff remained in said temporary hospital for a period of three weeks, during all of which time said nurse was in attend-

ance and properly medicated plaintiff's said wounds and bruises and properly cared for said plaintiff, and during all of said time plaintiff made no complaint of the attention he was receiving and did not state or in any manner intimate that he had any fractured bones as a result of said accident, and did not during any of said time demand or request of any of the officers of the defendant or of said nurse that he be examined or treated by physicians or surgeons. That on or about the 3d day of February, 1916, plaintiff, of his own volition and of his own desire left said temporary hospital and took up his lodgings in the defendant company's bunk-house and took his meals regularly at the defendant company's dining house. That thereafter on or about the 8th day of February, 1916, the defendant company caused said plaintiff to be examined by a competent and experienced physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, for the purpose of ascertaining if said plaintiff was then suffering from any injuries as the result of said accident; that said physician and surgeon thereupon made a careful and thorough examination of said plaintiff, and after completing said examination informed plaintiff and the officers of said defendant company that plaintiff had no broken or fractured bones and that he was not in any manner suffering from any injuries received in said accident and [18] that there was no reason whatever why plaintiff should not immediately resume work; that plaintiff at the time of said examination did not claim that his right clavicle was fractured or that

the motion of his right arm and shoulder was in any manner limited and did not make any demands upon the defendant company or its officers for any further medical treatment or for any further services of a physician or surgeon, and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter.

III.

That on or about the 20th day of February, 1916, the defendant established at Ellamar a complete hospital equipped with all modern surgical appliances, including an X-ray, and employed a competent and experienced physician and surgeon who was authorized to practice medicine under the laws of the Territory of Alaska, and ever since said date has maintained said hospital and has had in attendance said physician and surgeon.

IV.

That on or about the 15th day of April, 1916, the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, in which it was stated that plaintiff claimed compensation for injuries he had received in said accident to which said letter the defendant, on the 22d day of April, 1916, made a written demand on plaintiff to submit himself to an examination, which said written demand was in words and figures as follows:

“Messrs. Lyons & Ritchie, Valdez, Alaska.

Gentlemen:

Mr. L. L. Middelkamp, for the Ellamar Mining Company of Alaska, has called our attention to your

letter to him of recent date in which you call to the attention of the Company the claim of Tony Possus, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middelkamp states that the Company has a physician and surgeon in its employ at Ellamar, Alaska, authorized to practice medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of the your client made by such physician. The Company, therefore, requests Mr. Passos that he submit [19] himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the company will pay and advance to him upon demand at our office the necessary transportation charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company of course cannot pay any transportation or any expenses whatsoever for any other surgeon or physician who may desire, or whom Mr. Passos may desire, to be present at such examination. If, upon such examination, it is found that Mr. Passos is suffering from any physical injury incurred in his employment at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as herein requested."

That plaintiff refused to submit himself to the examination requested by the defendant and refused

to go to Ellamar for the purpose of being examined or treated by defendants physician and surgeon.

V.

That thereafter and on the 23d day of August, 1916, defendant served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Mr. Tony Possus of Valdez, Alaska, and Messrs. Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle we call your attention to the fact that some time ago Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first class physician and surgeon.

The Company now makes you the following offer. It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the Company's Surgeon will make an X-ray examination of that portion of your clavicle

you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the Company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company [20] will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter, pursuant to the foregoing demand, plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon, who is authorized to practice medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such positions that had this right clavicle been broken it would have been impossible for him to have done so; but plaintiff did claim that his muscle about his clavicle and right arm were sore; the defendant

thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars, and upon the defendant refusing to pay the said sum, plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever.

WHEREFORE, defendant prays that plaintiff take nothing by reason of the matter and things set forth in said complaint other than a judgment for \$210.00 for temporary disability for a period of three months and a half.

DONOHOE & DIMOND,
Attorneys for Defendant. [21]

United States of America,
Territory of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says: That I am the agent appointed by the defendant company upon whom service of Summons might be made within the Territory of Alaska, that I make this verification on behalf of defendant company; that I have read the foregoing answer and know the contents thereof and that the same is true as I verily believe.

T. J. DONOHOE.

Subscribed and sworn to before me this 29th day of Dec., 1916.

[Seal]

GEO. J. LOVE,

Notary Public in and for the Territory of Alaska.

My commission expires —.

I hereby accept service of the above and foregoing answer, by receiving a copy thereof, this 29th day of December, 1916.

LYONS & RITCHIE,

Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 29, 1916. Arthur Lang, Clerk. [22]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant.

Motion to Strike from Defendant's Answer.

Now comes plaintiff by his attorneys, Lyons & Ritchie, and moves the Court for an order striking from defendant's answer as irrelevant and redundant, the following:

I.

All of paragraph I of the affirmative defense to

plaintiff's first cause of action after the word "nurse" in the sixteenth line of said paragraph.

Also all after the word "sore" in the fifteenth line of page 4 of said affirmative defense to the end of paragraph II.

Also all of paragraph IV of said affirmative defense.

II.

The following in paragraph II of the affirmative defense to plaintiff's second cause of action, on page 7 of said answer: "in order to better care for its employees, who were slightly injured and to better administer first aid to those who might be seriously injured."

Also the following at the end of said second paragraph, on page 8: "and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter."

Also all of paragraphs III and IV of said affirmative defense to said second cause of action.

Also all of paragraph V of said affirmative defense to the second cause of action, on page 10 of said answer, after the word "refused" in the 23d line of said page 10.

LYONS & RITCHIE,
Attorneys for Plaintiff.

Copy received December 30, 1916.

DONOHUE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 30, 1916.

Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[23]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant.

**Order Striking Parts of Defendant's Answer to
Plaintiff's Third Amended Complaint.**

This matter coming on regularly to be heard in open court on the 30th day of December, 1916, on plaintiff's motion for an order striking certain parts of defendant's answer to plaintiff's third amended complaint, and the Court having heard the motion and being fully advised in the premises, makes the following order:

I.

IT IS ORDERED that that portion of the first paragraph of defendant's affirmative defense to plaintiff's first cause of action commencing with the word "that," in the sixteenth line, and ending with the word "or," in the twenty-third line, be stricken on the ground that the same is irrelevant and redundant matter. The portion of the paragraph stricken is as follows:

“that shortly after said physician and surgeon notified said plaintiff as aforesaid that he, the plaintiff, had fully recovered from the injury he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant’s knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar as aforesaid until on or.”

II.

It is ordered that that portion of the second paragraph of defendant’s affirmative defense to plaintiff’s first cause of action commencing with the word “the,” in the 15th line on page 4 of said paragraph, to the end of said paragraph may be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows: [24]

“the defendant thereupon acting through its said physician and surgeon offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscle for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon defendant refusing to pay said sum plaintiff departed from

Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

III.

It is ordered that the entire fourth paragraph of defendant's affirmative defense to plaintiff's first cause of action be stricken on the ground that the same is irrelevant and redundant matter. Said paragraph so stricken is as follows:

"Defendant further alleges that it has at all times since said accident and now is able, ready and willing to compensate plaintiff in accordance with the provisions of Chapter 71 of the Session Laws of the Territory of Alaska for the year 1915, for any and all injuries he received by said accident or for any injury he now sustains of which the injuries received in said accident were the proximate cause."

IV.

It is ordered that that portion of the second paragraph of defendant's affirmative defense to plaintiff's second cause of action commencing with the word "in," in the second line, and ending with the word "injured," in the fourth line of said paragraph, be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows:

"in order to better care for its employees who were slightly injured and to better administer first aid to those who might be seriously injured."

V.

It is ordered that that portion of the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, commencing with the word "and," in fourth line from the end of said paragraph, be stricken on the ground that the same is irrelevant [25] and redundant matter. The portion of the said paragraph stricken is as follows:

"and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter."

VI.

It is ordered that that portion of the fifth paragraph of defendant's affirmative defense to plaintiff's second cause of action commencing with the word "and," in the fifth line from the end of said paragraph, be stricken on the ground that the same is irrelevant and redundant matter. The portion of said paragraph stricken is as follows:

"and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

To the above ruling of the Court the defendant then and there accepted and the exception was allowed by the Court.

IT IS FURTHER ORDERED BY THE COURT that all the remaining parts and portions of plaintiff's motion be and the same are hereby denied.

To which ruling of the Court the plaintiff then and there accepted and said exception was allowed by the Court.

CHARLES E. BUNNELL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 30, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page 92. [26]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONNY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation.

Defendant,

**Amended Answer to Plaintiff's Third Amended
Complaint.**

Comes now the above named defendant, and by leave of Court first had and obtained, files this its amended answer to plaintiff's third amended complaint, and admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's first cause of action defendant admits the same.

II.

Referring to the second paragraph in plaintiff's

first cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's first cause of action, defendant admits that plaintiff is about 33 years [27] of age and at the time of receiving said accident he was receiving from said defendant \$4 per day for his work, and as to each and every other allegation in said paragraph contained, defendant denies the same.

For a separate answer and by way of affirmative defense to plaintiff's first cause of action defendant alleges:

I.

The defendant admits that the plaintiff was in its employ on the 13th day of January, 1916, and on said day in the course of his employment, as a miner, met with an accident in which he received certain injuries consisting of bruises on his right shoulder, a bruise adjacent to his left eye and a bruise on his jaw but did not have his right clavicle broken; that

on or about the 8th day of February thereafter, the defendant caused said plaintiff to be thoroughly examined by a competent physician and surgeon authorized to practice medicine under the laws of Alaska, who after such examination informed said plaintiff and informed the officers of said defendant in charge of the defendants mining operations at Ellamar that said plaintiff was entirely recovered from said injuries; that from the time of said accident, to wit, the 13th day of January, 1916, until said examination, to wit, the 8th day of February, 1916, defendant furnished plaintiff with board and lodging and had his wounds properly dressed and cared for by a competent and experienced nurse; about the 15th day of April, 1916, at which time the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, stating that plaintiff claimed compensation for the injury received in said accident, whereupon, the defendant on the 22d day of April, 1916, notified said plaintiff through his said attorneys that said defendant then had in its employ at Ellamar, Alaska, a competent physician and surgeon authorized to practice medicine under the laws of the Territory [28] of Alaska and the said defendant requested plaintiff to immediately submit to an examination by said physician and surgeon for the purpose of ascertaining the extent of said alleged injuries, and then and there offered to provide plaintiff with free transportation and all expenses that plaintiff might be put to in going from Valdez to Ellamar and return; that said plaintiff absolutely refused to submit him-

self to such examination.

II.

That thereafter and on the 23d day of August, 1916, defendant again served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit:

“To Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that some time ago Ellamar Mining Company requested you to submit an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so. The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital equipped with all modern surgical appliances, including an X-ray and has in attendance a first class physician and surgeon. The company now makes you the following offer: It will either take you in the company's launch or pay your transportation from Valdez, to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you,

and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words it will furnish you with free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination operation, if necessary, and until you have entirely recovered. The company will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the [29] Alaska Legislature of the year 1915. Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter pursuant to the foregoing demand plaintiff did submit himself to an examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practice medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such positions that had his right clavicle been broken it would have been impossible for him to have done so, but plaintiff did claim that his muscles about his clavicle and right arm were sore.

III.

Defendant alleges that plaintiff is not permanently injured in any degree whatever and is not suffering from any permanent disability whatever in any manner rising from the injuries received in said accident or of which the injuries received in said accident are the proximate cause; that the injuries received in said accident did not cause plaintiff a temporary disability for a period longer than three months and a half, which under the provision of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, would entitle plaintiff to the sum of two hundred and ten dollars, for which amount the defendant hereby tenders plaintiff judgment.

Referring to plaintiff's second cause of action contained in plaintiff's third amended complaint, defendant admits, denies and alleges as follows:

I.

Referring to the first paragraph of plaintiff's second cause of action defendant admits the same. [30]

II.

Referring to the second paragraph in plaintiff's second cause of action defendant denies that in the accident therein described, or at all, plaintiff's right clavicle was fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all, or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denies that the sight

of his left eye was temporarily destroyed or destroyed at all or in any manner impaired; denies that his jaw was partially paralyzed or paralyzed at all, and as to the other matters and things in said paragraph contained defendant admits the same.

III.

Referring to the third paragraph of plaintiff's second cause of action defendant admits that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of \$1.50 per month was deducted from his wages for hospital dues, and defendant admits that at the time of the accident to plaintiff he was employed by defendant as a miner and was receiving \$4 per day for his work; defendant denies each and every other allegation in said paragraph contained except as the same is specifically admitted in the affirmative defense to plaintiff's said second cause of action.

IV.

Referring to the fourth paragraph of plaintiff's second cause of action defendant denies each and every allegation therein contained.

For a separate answer and by way of affirmative defense to plaintiff's second cause of action defendant alleges: [31]

I.

That at the time of said accident and for seven years prior thereto the defendant did not maintain a hospital at its mine at Ellamar, Alaska; that all the employees of said defendant including this plaintiff

well knew that said defendant did not maintain a hospital at its said mine, and did not have a physician and surgeon in attendance at said mine, but for many years prior to said accident and at the time of said accident it was the custom and rule of said defendant mining company to maintain at its mine at Ellamar certain medicines, liniments, bandages and other appliances for the purpose of giving first aid to injured employees and for treating slight injuries that any of its employees might receive; that in case of serious injuries to any of its employees it was the rule and custom of said defendant to send its employees who were seriously injured to Valdez or Cordova for treatment by physicians and surgeons who might be practising their profession at either of said places; plaintiff during all the time he was in defendant's employ at the time of said accident knew of this rule and custom and at the time, the sum of \$1.50 per month was deducted from his wages, knew of this rule and custom and knew that this would be the character and kind of medical aid and treatment he would receive should he meet with an accident while in defendant's employ.

II.

That at the time of said accident and for a short time prior thereto the defendant equipped a temporary hospital and employed a competent and experienced nurse, which said nurse was in attendance at the time of said accident. Immediately after said accident plaintiff was taken to said temporary hospital where his wounds and bruises were properly cleansed, medicated and bandaged and plaintiff re-

mained in said temporary hospital for a period [32] of three weeks, during all of which time said nurse was in attendance and properly medicated plaintiff's said wounds and bruises and properly cared for said plaintiff, and during all of said time plaintiff made no complaint of the attention he was receiving and did not state or in any manner intimate that he had any fractured bones as a result of said accident, and did not during any of said time demand or request of any of the officers of the defendant or of said nurse that he be examined or treated by physicians or surgeons. That on or about the 3d day of February, 1916, plaintiff, of his own volition and of his own desire, left said temporary hospital and took up his lodgings in the defendant company's bunk-house and took his meals regularly at the defendant company's dining-house. That thereafter on or about the 8th day of February, 1916, the defendant company caused said plaintiff to be examined by a competent and experienced physician and surgeon authorized to practise medicine under the laws of the Territory of Alaska, for the purpose of ascertaining if said plaintiff was then suffering from any injuries as the result of said accident; that said physician and surgeon thereupon made a careful and thorough examination of said plaintiff, and after completing said examination informed plaintiff and the officers of said defendant company that plaintiff had no broken or fractured bones and that he was not in any manner suffering from any injuries received in said accident and that there was no reason whatever why plaintiff should not immediately re-

sume work; that plaintiff at the time of said examination did not claim that his right clavicle was fractured or that the motion of his right arm and shoulder was in any manner limited and did not make any demands upon the defendant company or its officers for any further medical treatment or for any further services of a physician or surgeon.

III.

That on or about the 20th day of February, 1916, the defendant [33] established at Ellamar a complete hospital equipped with all modern surgical appliances including an X-ray, and employed a competent and experienced physician and surgeon who was authorized to practise medicine under the laws of the Territory of Alaska, and ever since said date has maintained said hospital and has had in attendance said physician and surgeon.

IV.

That on or about the 15th day of April, 1916, the defendant company received a letter from plaintiff's attorneys, Lyons & Ritchie, of Valdez, Alaska, in which it was stated that plaintiff claimed compensation for injuries he had received in said accident to which said letter the defendant, on the 22d day of April, 1916, made a written demand on plaintiff to submit himself to an examination, which said written demand was in words and figures as follows:

"Messrs. Lyons & Ritchie, Valdez, Alaska.

Gentlemen:

Mr. L. L. Middlekamp, for the Ellamar Mining Company of Alaska, has called our attention to your

letter to him of recent date in which you call to the attention of the company the claim of Tony Possus, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middlekamp states that the company has a physician and surgeon in its employ at Ellamar, Alaska, authorized to practise medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of the your client made by such physician. The Company, therefore, requests that he submit himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the company will pay and advance to him upon demand at our office the necessary charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company of course cannot pay any transportation or any expenses whatsoever for any other surgeon or physician, who may desire, or whom Mr. Passos may desire to be present at such examination. If upon such examination it is found that Mr. Passos is suffering from any physical injury incurred in his employment at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as herein requested."

The plaintiff refused to submit himself to the [34] examination requested by the defendant and refused to go to Ellamar for the purpose of being examined

or treated by defendant's physician and surgeon.

V.

That thereafter and on the 23d day of August, 1916, defendant served upon plaintiff a written demand that he submit to an examination for the purpose of ascertaining the extent of his alleged injuries in words and figures, as follows, to wit.

"To Mr. Tony Possus, of Valdez, Alaska, and Messrs. Lyons & Ritchie, of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this company, and which you claim resulted in the fracture of your clavicle we call your attention to the fact that sometime ago Ellamar Mining Company requested you to submit to an X-Ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first class hospital, equipped with all modern surgical appliances, including an X-Ray, and has in attendance a first class physician and surgeon.

The Company now makes you the following offer. It will either take you in the company's launch or pay your transportation from Valdez to Ellamar, at which place the company's surgeon will make an

X-Ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first class hospital accommodations for the operation and until you are discharged as cured by the company's physician and surgeon. In other words it will furnish you free transportation to Ellamar, hospital accommodations, and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company [35] will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the company know at an early date as possible whether you accept or reject this offer."

That shortly thereafter pursuant to the foregoing demand plaintiff did submit himself to examination at Ellamar, Alaska, by the defendant's physician and surgeon who is authorized to practise medicine under the laws of the Territory of Alaska and an X-ray photograph taken of plaintiff's right clavicle disclosed that said right clavicle was not broken or fractured at the time of said examination, and plaintiff did not then claim that said clavicle was broken and used his right arm and shoulder freely and in such position that had his right clavicle been broken it would have been impossible for him to have done so, but plaintiff did claim that his muscle about his

clavicle and right arm were sore; the defendant, thereupon, acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused.

WHEREFORE, defendant prays that plaintiff take nothing by reason of the matter and things set forth in said complaint other than a judgment for \$210 for temporary disability for a period of three months and a half.

DONOHOE & DIMOND,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 2, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [36]
United States of America,
Territory of Alaska,—ss.

T. J. Donohoe, being first duly sworn, deposes and says: That I am the agent appointed by the defendant company upon whom service of Summons might be made within the Territory of Alaska; that I make this verification on behalf of defendant company; that I have read the foregoing amended answer and know the contents thereof, and that the same is true as I verily believe.

T. J. DONOHOE.

Subscribed and sworn to before me this 2d day of Jan., 1917.

[Seal]

T. P. GERAGHTY,
Deputy Clerk, of the District Court, for the Territory of Alaska, Third Division.

I hereby accept service of the above and foregoing amended answer, by receiving a copy thereof, this 2d day of Jan., 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff. [37]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant,

Reply.

Replying to defendant's answer to his first cause of action, plaintiff says:

I.

He denies that he was thoroughly examined by a competent physician and surgeon at Ellamar on February 8, 1916, or at any other time; he denies that defendant furnished him board and lodging until February 8, 1916, or at any time after he left defendant's alleged hospital about January 25, 1916;

denies that his wounds were properly dressed by a competent and experienced nurse, or at all, after leaving said hospital about January 25, 1916. He denies that he refused to submit to an examination by defendant's surgeon at any time but admits that he did refuse to go to Ellamar for such examination in April, 1916. He denies that when he was examined by defendant's surgeon at Ellamar in August, 1916, he used his right arm and shoulder freely, or that he so used either of them, or that he used either or both in positions that would have been impossible if his right clavicle had been broken. Plaintiff's knowledge of the English language is very imperfect, and he denies having any conversation with said physician at that time that was intelligible to himself. He denies that an X-ray taken at the time showed that his clavicle was not broken.

Answering defendant's answer to his second cause of action, plaintiff says:

II.

He denies any knowledge of defendant's hospital arrangements or system of caring for injured employees except in a casual way. He knew that defendant had a house equipped as a sort of crude hospital, with a woman in charge as nurse. He knew nothing of any further method of caring for injured employees and never had any conversation with any company official regarding the deduction of \$1.50 a month from his wages for hospital dues or what it would entitle [38] him to in case of his injury while in defendant's employ.

III.

Plaintiff denies all the allegations of paragraph II of defendant's affirmative defense to the second cause of action except so far as the same is admitted by his complaint.

IV.

Plaintiff denies that when he was examined by defendant's surgeon at Ellamar in August, 1916, an X-ray then and there taken showed that his right clavicle was not broken or fractured; denies that he then and there used his right arm and shoulder freely and in positions that would have been impossible if his clavicle had been broken. He alleges that by reason of his imperfect knowledge of the English language, such conversation as he had with defendant's surgeon was mainly unintelligible to him.

Wherefore plaintiff asks judgment as prayed for in his complaint.

LYONS and RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Tony Possus, being duly sworn, says he is the plaintiff in this action; that he has heard read the foregoing reply and he believes the same to be true.

TONY POSSUS.

Subscribed and sworn to before me this 2d day of January, 1917.

[Seal]

JOHN LYONS,
Notary Public.

My commission expires November 27, 1920.

Service by delivery of copy admitted January 2, 1917.

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 4, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [39]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 4, 1917.

Now, on this day, this cause came on regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff, and Donohoe & Dimond appearing as attorneys for defendant; Whereupon the following proceedings were had and done, to wit:

WHEREUPON the member of the regular panel of petit jurors was excused, and the jury being incomplete, and the United States Marshal having returned a special Venire, issued January 2d, 1917, into court, the following were selected as jurors:

- | | |
|---------------------|---------------------|
| 1. J. D. Jefferson. | 7. K. E. Rudolph. |
| 2. Harry Whitley. | 8. Ed. Rucker. |
| 3. C. H. Kraemer. | 9. S. C. Wheeler. |
| 4. A. Von Gunther. | 10. L. F. Washburn. |
| 5. Rudolph Schmidt | 11. C. P. Topliffe. |
| 6. B. C. Wiltse. | 12. H. J. Mitchell. |

And the trial panel being complete and being accepted by both parties hereto, the jury was duly sworn to try the issues in this cause.

WHEREUPON opening statements were made by attorneys for the plaintiff and attorneys for defendant.

WHEREUPON Peter Seminoff was sworn to act as interpreter for Tony Possus, plaintiff herein.

WHEREUPON Tony Possus was sworn and testified in his own behalf.

WHEREUPON this being the hour of adjournment and the trial of this cause being incomplete, the further trial of this cause is continued to January 5th, 1917, at the hour of ten o'clock, A. M.

September 1916 Term—January 4th, 1917—81st Court Day—Thursday.

Entered Court Journal No. 11, page No. 97. [40]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 5, 1917.

Now, on this day, this cause came on again regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond appearing as attorneys for the defendant, and after roll-call of jurors, the following proceedings were had and done, to wit:

WHEREUPON Dr. F. M. Boyle was sworn and testified on behalf of plaintiff.

WHEREUPON Plaintiff Exhibit "A" was offered and admitted in evidence.

WHEREUPON Tony Possus was recalled and testified further in his own behalf.

WHEREUPON Dr. C. A. Winans was sworn and testified on behalf of plaintiff.

WHEREUPON the deposition of Dr. W. H. Chase was admitted and read in evidence.

WHEREUPON Plaintiff's Exhibit "B" was offered and admitted in evidence.

WHEREUPON Dan Atrick was sworn and testified on behalf of plaintiff.

WHEREUPON plaintiff rests.

WHEREUPON defendant moves the Court for an instructed verdict on plaintiff's second cause of action and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON defendant made a motion for nonsuit on plaintiff's [41] second cause of action and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON L. L. Middelkamp was sworn and testified on behalf of defendant.

WHEREUPON Defendant's Exhibits Nos. 1 and 2 were offered and admitted in evidence.

WHEREUPON Mrs. S. A. Traumontien was sworn and testified on behalf of defendant.

WHEREUPON the deposition of Dr. B. F. Duckwall was admitted and read in evidence.

WHEREUPON this being the hour of adjournment, and the trial of this cause being still incomplete, IT IS ORDRED that the further trial of this cause be continued until Saturday, January 6th, 1917, at ten A. M.

September 1916 Term—January 5th, 1917—82d
Court Day—Friday.

Entered Court Journal No. 11, page No. 98. [42]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minutes of Court—Trial—January 6, 1917.

Now, on this day, this cause came on again regularly for trial, Lyon & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond appearing as attorneys for defendant, and after roll-call of jurors, the following proceedings were had and done, to wit:

WHEREUPON Dr. E. C. Gross was sworn and testified on behalf of defendant.

WHEREUPON Defendant's Exhibits Nos. 3, 4 and 5, were offered and admitted in evidence.

WHEREUPON Dr. George Newlove was sworn and testified on behalf of defendant.

WHEREUPON H. W. Ells was sworn and testified on behalf of defendant.

WHEREUPON Dr. E. C. Gross was recalled and testified further on behalf of defendant.

WHEREUPON defendant rests.

WHEREUPON E. E. Ritchie was sworn and testified in rebuttal on behalf of plaintiff.

WHEREUPON argument was had by respective counsel and the jury being duly instructed by the Court as to the law in the premises, retire in charge of their sworn bailiffs for deliberation.

WHEREUPON court was adjourned until Monday, January 8th, 1917, except for the purpose of receiving the verdict in cause No. 857.

CHARLES E. BUNNELL,
Judge.

September 1916 Term—January 6th, 1917—83d Court Day—Saturday.

Entered Court Journal No. 11, page No. 100.
[43]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard, at Valdez, Alaska, in the above-entitled court, on Thursday, the fourth day of January, 1917, at ten o'clock A. M. before Honorable CHARLES E. BUN-

NELL, Judge of the District Court for the Territory of Alaska, assigned to the Fourth Division, sitting in lieu of the presiding Judge of the Third Division by agreement of counsel, and Jury;

The plaintiff being represented by his attorneys and counsel, Messrs. Lyon & Ritchie:

The defendant corporation being represented by its attorneys and counsel, Messrs. Donohoe & Dimond and W. S. Bonnifield, Esq.:

The jury having been empaneled and sworn, opening statements were made to the Court and jury by Mr. Ritchie in behalf of the plaintiff and by Mr. Donohoe in behalf of the defendant corporation:

WHEREUPON the following additional proceedings were had and done, to wit: [44]

Testimony of Tony Possus, for Plaintiff.

TONY POSSUS, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. RITCHIE.

(Examination through Interpreter PETER SEMINOFF—Russian and English.)

Q. What is your name? A. Tony Possus.

Q. Where do you reside? A. Valdez.

Q. What country are you a native of?

A. He is a Russian, Lutanian, that is on the Baltic coast, the northern part of Russia.

Q. That is one of the Baltic provinces?

A. Yes, sir, that is one of the Baltic provinces.

Q. How long have you lived in the United States?

A. Five years.

Q. How long have you lived in Alaska?

(Testimony of Tony Possus.)

A. Second year, going on my second year—two years.

Q. What is your business or occupation?

A. He works in the mines—mining.

Q. How long have you been a miner?

A. He says he worked in the mines for five years, three years in the states, working in the tunnels.

Q. Did you ever work in coal mines?

A. No. He wasn't working in coal mines.

Q. What kind of mines have you worked in?

A. Silver mines in the State of Utah,—Park City, Utah.

Q. Were you ever at Ellamar?

Mr. DONOHOE.—At this time the defendant desires to interpose an objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff's [46] Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

1. Plaintiff's first cause of action, as set forth in his third amended complaint, is an action *ex delicto*, having for its foundation an alleged tort of the defendant and plaintiff's said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff's said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort, as he nowhere alleges malfeasance on the part of the defendant in

(Testimony of Tony Possus.)

connection with said hospital contract but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

2. Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled, "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act."

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's said second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause [47] of action are entirely different from that of the said first cause of action.

3. Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, of which the accident occurring in the defendant's mine on the 12th day of January, 1916,

(Testimony of Tony Possus.)

was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

Further, the defendant demurs to plaintiff's second cause of action set forth in plaintiff's third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth in said first cause of action. To permit the plaintiff to maintain his second [48] cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer

(Testimony of Tony Possus.)

twice in damages for the same cause of action.

And further, defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

These are the same grounds I had in the demurrer and in order to preserve the record, I desire to make this objection at this time as a demurrer to the entire evidence.

By the COURT.—The objection is overruled and exception allowed.

Mr. DONOHOE.—Now, I move the Court for an order requiring the plaintiff to elect on which of his two causes of action he now seeks to recover, on the theory that both causes of action are for the same thing and cannot be separated.

By the COURT.—Which motion is denied and exception allowed.

(Last question read as follows:)

Q. Were you ever at Ellamar? A. Yes.

Q. Did you ever work in the Ellamar mine?

A. Yes, sir, he was working in Ellamar.

Q. That is, the mine of the Ellamar Mining Company of Alaska?

A. Yes, sir—he was working at the mine of the Ellamar Mining Company at Ellamar, Alaska.

Q. When did you first work there? When did you begin working there?

A. He says he worked there eight months; he

(Testimony of Tony Possus.)

started early in the spring and worked until January.

Q. Started in the spring of 1915?

A. Yes, 1915, the spring of 1915.

Q. And worked until what time?

A. Until January, 1916, the 12th of January, 1916. [49]

Q. Were you working steadily all that time?

A. He was slightly injured at one time, some time past and he lost three days, a slight injury in his leg.

Q. What work did you do in the Ellamar mine?

A. He was a machine man.

Q. Just explain what you mean by a machine man?

A. He was running the machine.

Q. Ask him about it.

A. The first time he started on a small machine called a stoper, the machine was small; the big machines they use in the drifts; he worked at it the first time and twenty days at the big machine in the stope.

Q. What is the machine for? What does he mean by that? What work does the machine drill do in the mine?

A. He said they use the machines for breaking the ore.

Q. Were you working in the Ellamar mine for this company on the 12th of January, 1916, a year ago?

A. Yes, sir, he was working there the 12th of January.

Q. What shift were you on?

A. He said they were working at night shift that

(Testimony of Tony Possus.)

time,—they were changing the shifts every two weeks he says, or every month, I don't know.

Q. Did you do anything that night except work on the machine drill?

A. He said he was ordered by the shift boss to go and load some waste, where he was working on the machine before.

Q. Was this waste in the same part of the mine or some distance away?

A. He says some distance away, probably six or seven hundred feet or 900 feet, he don't remember.

Q. Who was the shift boss?

A. Oscar Johnson was the shift boss. [50]

Q. Where is Oscar Johnson now?

Mr. DONOHUE.—We object to that on the ground that it has no bearing on this case.

Objection overruled. Defendant allowed an exception.

A. He got killed.

Mr. DONOHUE.—We admit that Oscar Johnson is not down at that place now and is not here and we move that the answer be stricken.

Motion denied; defendant allowed an exception.

Q. How did you go to get to the waste work where you were ordered to go?

A. He said they call the 100 raise the same place they were working before,—it is 100 they call it.

Q. Did the boss tell him how to get to the other part of the mine—if so, what did he tell him to do?

A. He says he was ordered by the shift boss to go on and load the waste on the car.

(Testimony of Tony Possus.)

Q. How was he ordered to go there? How did the boss tell him to go, to walk or to ride or fly or what?

Mr. DONOHOE.—I object to this question on the ground that it is incompetent, irrelevant and immaterial. We have admitted everything they pleaded on that question, that he was sent by Oscar Johnson and how he went there. In our admissions to paragraph 2 of the first cause of action we admit all that.

Objection overruled; defendant allowed an exception.

Mr. DONOHOE.—I am willing for you to take your pleading and read it.

Mr. RITCHIE.—All right. Do you object to my reading this paragraph down to that point (handing paper to counsel).

Mr. DONOHOE.—No.

Mr. RITCHIE.—This is admitted to be the facts in the case by both sides:

“On or about January 12, 1916, and for about eight months [51] prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100 foot level of said company’s mine. At about eight o’clock P. M. he and another miner named Louis —, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the

(Testimony of Tony Possus.)

glory-hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started the same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory-hole. In the contact of the car with said wall plaintiff was pinned under the car and sustained the following injuries:

By the COURT.—You understand, gentlemen, that both counsel for the plaintiff and counsel for the defendant admit what Mr. Ritchie has just read as being true and it is to be considered by you as evidence.

Q. What caused the car to strike that rock wall?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial—we admit he did strike the wall and got injured.

By the COURT.—In view of the pleadings and the admission, the objection is sustained.

Plaintiff allowed an exception to the ruling.

Mr. RITCHIE.—In order to save the record, we desire to make an offer to prove by this witness—

Mr. DONOHOE.—I insist on the jury being dismissed before that is done, or that it be reduced to writing.

(Whereupon, without the hearing of the jury, in the presence of counsel and the Court, the following proceedings were had:)

Mr. RITCHIE.—We offer to prove by the testimony of plaintiff that the cause of the contact of the car with the rock wall in said mine, resulting in the injury to plaintiff as set out in plaintiff's first cause

(Testimony of Tony Possus.)

of action was due to a defective brake on said car, causing the same to become uncontrollable and to run away at great speed. [52]

By the COURT.—The offer to prove will be denied and exception allowed plaintiff.

Q. Now, when the car struck the rock wall, what happened, if any thing?

A. He says he was pinned under the car and lost his consciousness and he don't remember anything more.

Q. Tell what happened when you first recovered consciousness.

A. He said he regained his consciousness when he was hoisted on top.

Q. Where were you when you recovered consciousness? A. He said he was on top.

Q. Outside of the mine?

A. He said in the hoist-room.

Q. Had he been taken away from the car at that time?

A. Yes, sir, he was taken out from the car.

Q. When you were on the car, where were you riding, on which end of the car?

A. He said the front end of the car.

Q. Do you know just how you struck?

A. He says he was struck with the car against a wall and he lost his consciousness.

Q. Did it happen very suddenly?

A. He says it happened very quick, he don't remember—he didn't have a chance to jump, he says.

Mr. DONOHOE.—We object to this line of testi-

(Testimony of Tony Possus.)

mony—it has already been ruled on.

Objection sustained; plaintiff allowed an exception.

Q. After you recovered consciousness, where did you go or where were you taken?

A. He was taken down to the hospital.

Q. What injuries did he suffer? Tell him to describe his injuries or hurts.

A. He says he was hurt in his shoulder. [53]

Q. Tell him to describe that. To take each of his injuries, one at a time and have him tell about it.

A. He says he got hurt in his shoulder.

Q. Does he know anything more about it than that?

A. He says he broke it—it hurt him in the jaw and broke his two teeth, he says.

Q. What was the result of his injury to his shoulder—does it affect his ability to use it, in any way?

A. He says he is unable to work after he got hurt in his shoulder.

Q. Has he been able to work at any time since?

A. He says, no, he was not able to work since the injury.

Q. Can he use his right arm and shoulder in lifting?

A. He says, no, he can't lift anything with the right arm.

Q. Can you handle any kind of tool that requires muscular exertion with the right arm and shoulder?

A. He says he is not able to use his right arm yet.

(Testimony of Tony Possus.)

Q. Show the jury how high you can lift your right arm.

(Witness does so.)

Q. Can you lift it any higher than that?

A. No—he says he can't lift it any higher. He says he can just swing it that far.

Q. Is there any injury to your arm below the shoulder?

A. He says not below the shoulder, just underneath here—there is some pain here.

Q. What other injury did he suffer?

A. He says over here, over the eye and his jaw and teeth.

Q. What injury was inflicted upon his eye?

A. He said he got a bruise over his eyes—it was bruised and shattered.

Q. Over which eye? A. The left eye.

Q. What result did that leave, if any? [54]

A. He says at the present time he can see, it is all right but at the time it was hurt, it affected his eyesight.

Q. For how long? A. Just about a month.

Q. How much did it affect his eyesight,—could he see at all?

A. He says he was able to see, but it was poor light.

Q. What injury was there to the jaw that he referred to a while ago?

A. He says two teeth were knocked out.

Q. Which side of the jaw?

A. Upper side, on the left side.

(Testimony of Tony Possus.)

Q. You say two teeth were knocked out or broken?

A. He says there was two teeth knocked out.

Q. What else, if anything?

A. He says that was all.

Q. What was the effect of this bruise on the jaw, if any?

A. He says he wasn't able to eat for a long time.

Q. Why wasn't he?

A. He says he couldn't open his jaw because it was so sore. He couldn't open it to even eat, just to drink soup or something.

Q. How wide could he open his mouth the first day or two after he was hurt?

A. He says just about an inch he could open his jaw.

Q. How long did that condition continue? How long was it before his jaw began to get better so he could open his mouth wider?

A. He says over forty days, or a month and a half or so.

Q. How long did he suffer any pain or handicap in the use of his jaw?

Mr. DONOHOE.—We object to that question at this time on the ground that if the evidence is applied to the first cause of action it is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action [55] may be proven first and then the second or whether the evidence will be intermingled in the two

(Testimony of Tony Possus.)

causes of action—I am at a loss to know how to proceed on it.

The COURT.—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.

(Last question read by reporter as follows:)

Q. How long did he suffer any pain or handicap in the use of his jaw?

A. He said he wasn't able to eat very much for forty days.

Q. How long was it before he entirely recovered the use of his jaw?

A. He says after two months after his injury he was able to eat well.

Mr. RITCHIE.—I believe it is admitted he was taken to the building used as a hospital by the Ellamar Mining Company at that time.

Mr. DONOHOE.—I think so. We will admit that the plaintiff was taken to the temporary hospital, used as a hospital by the Ellamar Mining Company, if we haven't already admitted it.

Q. Did anybody have the care of you after you were taken to the hospital?

A. Mrs. Tramontin, the nurse.

Q. What, if anything, did Mrs. Tramontin do for you?

A. He says she put a plaster on his shoulder and a bandage on.

(Testimony of Tony Possus.)

Q. Anything else?

A. He says she bandaged up his cut over the eye and that is all.

Q. Just describe how she bandaged you—just indicate how and where the bandages were placed.

Mr. DONOHOE.—We object to any testimony being offered at this time in any manner tending to prove the allegations of plaintiff's second cause of action on the ground that the complaint, so far [56], as that action is concerned, does not state facts sufficient to constitute a cause of action, and on the further ground that it commingles the two causes of action together in such a manner that the jury will not be able to determine one from the other any degree of certainty or definiteness.

Objection overruled; defendant allowed an exception.

A. Right close to the shoulder.

Q. What kind of a bandage?

Mr. DONOHOE.—We make the same objection.

Objection overruled; defendant allowed an exception.

A. With a thin bandage,—a thin bandage.

Q. Did she put anything else on besides the bandage?

Mr. DONOHOE.—We object to that as leading.

Objection overruled; defendant allowed an exception.

A. He says she put some medicine in his bruise.

Q. How long did she leave the bandage on you?

A. It was taken off the next day.

(Testimony of Tony Possus.)

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on?

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid form, was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHOE.—I have an objection and exception to all this line of testimony?

The COURT.—Yes, sir.

A. He says not over six inches wide, square.

Q. After she took the plaster off, what was the appearance of [57] your shoulder?

A. He says his shoulder was black.

Q. How much of it? How much of his shoulder was black?

A. He says there was a big black bruise on his shoulder.

Q. Did it remain in normal condition as to size?

A. He says there was a big swelling in it.

Q. How long did it remain black or discolored?

A. He says about twenty-five days.

Q. How long was there any swelling there?

A. He says the swelling was about 18 or 20 days—he doesn't remember exactly how long the swelling was on his shoulder.

(Testimony of Tony Possus.)

Q. How long did you remain there in the hospital?

A. Fourteen days.

Q. Why did you leave the hospital?

A. He was ordered by Mr. Gedney to leave the hospital.

Q. Who is Mr. Gedney?

A. He says he is foreman.

Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into the hospital?

Mr. DONOHUE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT.—He may answer; the objection will be overruled.

Defendant allowed an exception to the ruling.

A. He didn't understand the question.

(Question read as follows:)

Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into [58] the hospital?

A. He says nobody was seeing him at all.

Q. Do you know who had charge of the work there generally, at that time? A. Mr. Estey.

Q. Who is Mr. Estey?

A. He was a bookkeeper up there.

Q. Was Mr. Middlecamp there at that time?

(Testimony of Tony Possus.)

A. He says, no, he was not there.

Q. He was not in Ellamar at that time?

A. No, he says he was not in Ellamar.

Q. And was Mr. Estey in general charge of the work?

A. He says he was in charge of the mine at that time.

Q. Did Mr. Estey ever come to the hospital to see you?

A. He saw him the next day after he got hurt.

Q. Tell him to answer the question—Did Mr. Estey ever come to the hospital to see him? He can answer that Yes or No.

A. He says he came to see him the next day.

Q. What did Mr. Estey say, if anything?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Mr. RITCHIE.—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT.—Mr. Interpreter, did you give the entire answer to the last question?

The INTERPRETER.—Yes, your Honor, I did.

The COURT.—That was all his answer?

The INTERPRETER.—Yes. [59]

By the COURT.—He may answer the question.

(Testimony of Tony Possus.)

The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled; defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign this paper you get your half pay; if you don't sign, we are going to throw you out the next day.

Q. Did he tell him what was in the paper? If so, what?

Mr. DONOHOE.—We make the same objection.

The COURT.—The objection will be sustained to that question.

Plaintiff allowed an exception to the ruling.

Q. Did Mr. Estey come back afterwards at any time to the hospital?

Same objection; objection overruled; defendant allowed an exception.

A. He was at the hospital four days afterwards.

Q. What did he say, if anything, then?

Same objection; objection overruled; defendant allowed an exception.

A. He says Mr. Estey was not talking to him at all, he was talking to Mrs. Tramontin and was asking how many stitches he has in his cut over his eye.

Q. Did Mr. Estey come at any time after that?

(Testimony of Tony Possus.)

Same objection; objection overruled; defendant allowed an exception.

A. He was not there any more.

Q. Did Mr. Gedney ever come to the hospital?

A. Mr. Gedney was in the hospital too, he came to see him.

Q. When did he first come to the hospital?

A. He says that Mr. Gedney was there at the same time that Mr. Estey brings that paper to sign. [60]

Q. Did he come there at any time afterward?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff's testimony that Mr. Gedney had no power to bind the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception.

A. He says he was there a couple of days afterwards, him and the shift boss—Mr. Gedney and the shift boss.

Q. What did Mr. Gedney say, if anything, at that time?

Mr. DONOHOE.—We object to that on the grounds set forth in our last objection.

Objection sustained; plaintiff allowed an exception to the ruling.

Q. Did Mr. Gedney come back at any other time after that?

(Testimony of Tony Possus.)

A. He says he was to see him one day afterwards, after that.

Q. How did you come to leave the hospital?

A. He says Mr. Gedney come and ordered him out.

Mr. DONOHOE.—We move to strike out anything said by Mr. Gedney.

By the COURT.—He has already testified that he left the hospital at the order of Mr. Gedney and he may testify as to what Mr. Gedney said at the time he left the hospital. Motion denied.

Defendant allowed an exception to the ruling.

Q. State what Mr. Gedney said, if anything, when he left the hospital.

A. Mr. Gedney said, you better go to the bunk-house because nobody is going to wait on you here—you are able to go yourself.

Q. Now, what did Mrs. Tramontin tell him, if anything, about his [61] injuries, when she first took charge of him?

Mr. DONOHOE.—We object to that question on the ground that there is no proper foundation laid to bind this company in any manner or in any form by what Mrs. Tramontin might have said or might not have said.

Mr. RITCHIE.—I will withdraw the question.

Q. After you left the hospital, where did you go?

A. He says he went to the bunk-house, the company's bunk-house.

Q. What did you do there?

A. He says he wasn't doing anything, just lying there in the bed.

(Testimony of Tony Possus.)

Q. How long did you remain in the bunk-house?

A. Fourteen days.

Q. How long did you remain in the bunk-house did you say?

A. Fourteen days he was lying in the bunk-house.

Q. How did you live during that time, that is, where did you get your meals and how?

A. He says two days nobody was bringing him meals and the third day some of his friends bring his meals.

Q. After that how did he get his meals?

A. Three times some of his friends were bringing his meals and after that he went to his meals himself.

Q. To the company boarding-house?

A. Yes, sir, the company's boarding-house.

Q. To what extent could you use your jaw at that time in eating?

A. He says he only could eat just the soup.

Q. Could he eat anything more than that as long as he remained in the bunk-house?

A. He says anything in liquid form, coffee or tea—he says he dissolved cake in the coffee and drank that.

Q. Why did you leave the bunk-house?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial [62] and not within the issues joined by the pleadings. Objection overruled; defendant allowed an exception.

A. He was ordered by Mr. Estey to go to work—if he don't go to work he had to move, roll his bed and move out altogether from the bunk-house.

(Testimony of Tony Possus.)

Q. What did he do then?

A. He says he had twelve days' time coming that time and he wants his time.

Q. That was in the conversation with Mr. Estey, was it—that was before he left or after he left the bunk-house?

A. That was before he left the bunk-house—he says the time he was ordered to leave the bunk-house.

Q. What did he do when he was ordered to leave the bunk-house?

A. Some of his friends rolled his bed and he then went down to Jim Fielder's place, down at Ellamar.

Q. How long did he stay there?

A. Four days.

Q. And then what did he do?

A. He was waiting for the boat to come to Valdez.

Q. Did he leave Ellamar or stay there?

A. He says he left Ellamar.

Q. Where did he go from Ellamar?

A. He came to Valdez.

Q. Where have you been since then? Where has he been since?

A. When he came to Valdez he stopped at Mr. Conley's place.

Q. He has been in Valdez since, has he?

A. Yes, sir, he was living ever since in Valdez.

Q. Ask him if he remembers what date he got here in Valdez?

A. He says he don't remember the date, what date

(Testimony of Tony Possus.)

it was when he came to Valdez.

Q. How old are you, Tony? [63]

A. 34 years of age.

Q. Now? A. Yes, sir.

Q. Have you any family?

A. He has just got a mother.

Q. He is not a married man?

A. No, he is not married.

Q. Is your father living? A. Father died.

Q. Where is your mother?

A. His mother is in the old country.

Q. Have you given or sent anything to your mother for her support of late years?

Mr. DONOHOE.—We object as leading.

The COURT.—It is leading but he may answer the question.

Mr. DONOHOE.—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. RITCHIE.—I can't cover it all at once.

By the COURT.—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support. Defendant allowed an exception to the ruling.

A. He says, yes, he was sending money.

Q. How much has he sent to her since he came to America? A. \$550.

(Testimony of Tony Possus.)

Q. Has his mother any property of her own or any means of livelihood?

A. He says, no, she has no property.

Q. How old is she? [64] A. About 65 years.

Q. When did you last send her money?

A. He says he sent some money before he started to work at the Ellamar mine. He says he sent some money from Salt Lake City but the time the war started the money came back, some fifty dollars came back.

Q. That was before he came to Ellamar?

A. That was before he came to Ellamar.

Mr. RITCHIE.—I believe it is admitted he was earning four dollars a day?

Mr. DONOHOE.—Yes, sir.

Q. How long have you worked as a drill man?

A. He says he worked eight months in Ellamar.

Q. I mean altogether? A. For three years.

Q. Did he draw as high wages as anybody for that work?

Mr. DONOHOE.—We object as incompetent, irrelevant and immaterial—they plead he was getting four dollars a day at the time of the accident and we admit it.

Mr. RITCHIE.—We plead he was able to draw the highest wages paid for that kind of work.

The COURT.—It being shown he was working there and admitted he was running a machine drill and was getting four dollars a day, it seems to me that covers it. Objection sustained. Plaintiff allowed an exception.

(Testimony of Tony Possus.)

Q. Have you suffered any pain from your injuries?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. So far as the first cause of action is concerned, it doesn't matter whether he suffered pain or not; if directed to the second cause of action, the two actions are so intermingled that it would be impossible. [65] for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the alleged other cause.

Objection overruled; defendant allowed an exception.

A. He says he pains occasionally now yet from the injury.

Q. Where does he suffer pain?

Same objection; overruled; defendant allowed an exception.

A. He says right in his shoulder is the pain and he says occasionally he has pains in his head.

Q. Has he suffered pain continuously in his shoulder or only from time to time?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm, then he has got a pain in his shoulder.

Q. Have you tried recently to use your arm and shoulder in any kind of work?

(Testimony of Tony Possus.)

A. He says, no, he didn't try—it is always painful to lift his arm and his arm pains yet.

Q. During the first few weeks after this injury, did you suffer much pain or only a little?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. At first when he got hurt he has a strong pain in his shoulder—he is not able to put his coat on or nothing.

Mr. RITCHIE.—That is all at this time. [66]

Cross-examination by Mr. DONOHUE.

Q. What part of Russia did you come from?

A. Lebau, Russia.

Q. What occupation was he engaged in when he lived in Russia?

A. He says he was a laborer in Russia, just a laborer.

Q. Where did he first land in America and when?

A. He says he arrives in the city of New York.

Q. When? A. Five years ago.

Q. Where did he first go to work?

A. He says he went to work in the first place in the Gunnison Tunnel, Colorado.

Q. How long did he work there?

A. Four months and a half.

Q. What kind of work was he doing there?

A. He was working on concrete work.

Q. Was he an ordinary laborer at that work?

A. Yes.

Q. Where did you next go to work?

(Testimony of Tony Possus.)

A. Strubble tunnel.

Q. When and where did you first become engaged in mining?

A. In Park City, Utah, the Dilly Judge Mine, three years ago.

Q. How long did you work in that mine?

A. Nine months and a half.

Q. Did you have any accident in that mine?

A. No, there was no accident in it.

Q. You were not injured in any accident in that mine?

A. No, he was not injured in that mine at all.

Q. What mine did you next work in?

A. He was at Midway, Utah, the Snake River tunnel.

Q. How long did you work there? [67]

A. About fifteen months, he says.

Q. Did you receive any injuries in that work?

A. No, he says he was not injured at that time.

Q. When did you first come to Alaska?

A. He says about two years ago, something like that—he says next spring will be two years when he first arrived in Alaska—he don't remember the month exactly.

Q. What mine did you first work in in Alaska?

A. He says the first mine he worked in in Alaska was the Ellamar mine.

Q. Now, what work were you engaged in between the time you first landed in Alaska and the time you went to work in the Ellamar mine, for the Ellamar Mining Company?

(Testimony of Tony Possus.)

A. He says he wasn't working nowhere except he was waiting fifteen days for the work there at Ellamar—the first place he worked was Ellamar.

Q. When did you last hear from your mother, receive a letter from her?

A. It is two years ago since he had the last word from his mother.

Q. Two years ago? A. Yes.

Q. And you don't know at this time whether your mother is living or not, do you?

A. He says he don't know if his mother is living or not now on account of the war.

Q. You don't know whether your mother was living on the 12th day of January, 1916, the date of the accident, do you?

A. He says he don't know whether his mother was alive on the day he got hurt or not.

Q. You didn't send any money to your mother during all the time you were working in Ellamar, did you? [68]

A. He says he wasn't sending any money from Ellamar, wasn't sending her any money from Ellamar—he says on account of the war the money came back to him.

Q. Is it not a fact that the other Russian boys or men that were working at Ellamar, were sending money to their folks in the old country during the time you were working there?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

(Testimony of Tony Possus.)

Objection sustained; defendant allowed an exception to the ruling.

Q. How do you know that you couldn't have sent money to your mother if you cared to?

A. He says the place where he was living, that place is occupied by Germany now, near Dwinsk, thirty miles from Dwinsk—that place is occupied by Germany and he couldn't send it there, because he don't know whether his mother is living there—all the people left the country.

Q. Is it not a fact when you last heard from your mother she was living with either your brother or sister in the old country?

A. He says his mother lived with his sister before—his sister was not married; he says his sister and him is not married, he says she is single.

Q. Have you that letter you received from your mother two years ago?

A. He says he hasn't got it now, he lost it or something.

Q. What is his answer?

A. He says he hasn't got the letter, he lost it.

The COURT.—Did he say he lost it?

A. Yes, sir.

Q. Where did you send this \$500 from that you spoke of?

A. He says he was sending his money from Park City, Utah, from Gunnison Tunnel and Strubble Tunnel, where he was working—he was sending money from three places. [69]

Q. Is it not a fact that that money you sent back

(Testimony of Tony Possus.)

was sent to pay your passage out to America and not for the support of your mother?

A. He says the money he is sending for his mother, not to pay passage to America.

Q. Who advanced you the money to pay your passage to America?

A. He says the money was given him by his brother.

Q. By his brother?

A. Yes, his brother—he was sending him \$300 from Colorado to pay his passage to America.

Q. When did you first send money to your mother?

A. He says he sent money to his mother from Gunnison Tunnel, the first place he was working.

Q. And where was he when he sent the last money?

A. He says the last time he sent it from Park City, Utah—no, Salt Lake City.

Q. When was that?

A. He says just before he started to Alaska. It was a short time before he started to Alaska; it will be two years in the spring when he sent the money last to his mother.

Q. That money was not delivered to your mother but returned to you, was it?

A. That money was sent to him back, by the agent.

Q. Who was the agent—where was he?

A. In Chicago, Illinois.

Q. In Chicago? A. Yes.

(Testimony of Tony Possus.)

Q. What month was that and what year when he sent that money? A. He says 1914.

Q. When did you last send money, previous to that, to your mother? [70]

A. Park City, Utah, he sent money previous to that.

Q. When? What date? What month and what year?

A. He says he don't remember, he was sending her money right along in 1913 and 1914.

Q. You never sent your mother any money after 1914?

A. No, he wasn't sending any more since the money came back to him from Chicago.

Q. And you don't know whether your mother is alive or not?

A. He says that place is occupied by Germany and he don't know if his mother is sent out to some different province and he don't know the address where his mother lives—perhaps his mother is alive or dead, he don't know he says.

Q. When you were taken to the temporary hospital of the defendant company at Ellamar, after this accident occurred on the 12th day of January, 1916, didn't the nurse there dress your wounds and bandage you up and take care of you?

A. He says he was bandaged up the same day he was brought up to that hospital by the nurse who was in charge there.

Q. Is it not a fact that the nurse took six or seven stitches in the cut over your left eye?

(Testimony of Tony Possus.)

A. He says yes.

Q. Now, she treated that wound all right, didn't she?

Mr. RITCHIE.—We object, as calling for a conclusion.

Objection sustained; defendant allowed an exception.

Q. Did you make any complaint to the nurse or the officers of the company that you were not getting proper treatment in the hospital at Ellamar?

A. He says no.

Q. Now, was there any bruise on your left jaw when you were taken to the hospital after the accident?

A. He says there was a mark on his cheek. [71]

Q. Was it a cut, so it was bleeding?

A. Yes; it was a cut.

Q. How much of a cut?

A. He says over the eye.

Q. I mean his jaw, where the teeth were broken—was there any cut on the outside there?

A. He says just a swelling, that is all.

Q. Just a swelling? A. Yes, sir.

Q. Did you tell the nurse that you had a couple of teeth broken out? A. Yes, sir.

Q. Now, in regard to your ability to use your jaw, while in the hospital—is it not a fact that you ate beefsteak the third day you were there?

A. He says no.

Q. How did you get your meals while in the hospital? A. It was brought to him by the cook.

(Testimony of Tony Possus.)

Q. From the messhouse?

A. From the messhouse, yes.

Q. Did you get your meals regularly, three times a day? A. Yes, sir; three times a day.

Q. You say that all the time you were in the hospital, you couldn't eat anything but soup, is that right? A. Yes, that is all.

Q. Couldn't eat any fruit while you were in the hospital—you didn't have fruit?

A. He says no—he says fruit was brought to him, but he wasn't eating it.

Q. How long did the nurse leave those bandages on? A. It was taken away the next day.

Q. And was another bandage placed on the next day? [72] A. Just the plaster was left.

Q. Then after the first day, the nurse had no bandage on you at all—is that correct?

A. No, sir.

Q. That is correct? A. Yes, sir.

Q. Did you notify the nurse or tell the nurse that you had a broken bone in your shoulder while there?

A. He says he made a complaint to the nurse fifteen days afterwards—his shoulder was paining all the time and he made a complaint the shoulder was broken.

Q. Take your coat off and point out to the jury exactly where that pain is.

(Witness does so.)

Q. Point out the exact spot on your shoulder where the pain is. A. He says on his shoulder.

Q. Take your shirt down. (Witness removes his

(Testimony of Tony Possus.)

shirt and undershirt.) Now, point out the spot where the pain is.

A. Right there (indicating).

Q. Turn to the jury and point out the spot.

(Witness does so.)

Q. Got any pain in this shoulder? (Referring to the other shoulder.) A. No.

Q. When did the nurse take these stitches out of the cut over your eye?

A. He says he don't remember—it was seven or eight days.

Q. Do you remember looking in the glass and telling her she did a splendid job?

A. He says he remembers.

Q. He did? A. Yes. [73]

Q. You remember the nurse asking you shortly after you came to the hospital if you wanted to be sent to town, do you not?

A. He says he don't remember.

Q. Is it not a fact that in reply to that question you stated no, addressing the nurse—you stated, "No, you got two or three boys all right that have been here and I guess you can attend to me," or words to that effect?

Mr. RITCHIE.—We object, for the reason that he was not the judge of his own injuries, and too indefinite.

(Question withdrawn.)

Q. Is it not a fact that at the defendant's temporary hospital, at Ellamar, between the 12th and the 20th day of January, 1916, yourself and Mrs. Tra-

(Testimony of Tony Possus.)

montin being present and none others, the following conversation took place between you, in words to this effect: Mrs. Tramontin asked you if you wanted to be sent to Valdez for treatment by a physician; in reply to that you stated, "No, you (meaning Mrs. Tramontin) were successful in taking care of other miners who have been injured and I guess you can take care of me"?

Mr. RITCHIE.—We object to that as irrelevant and immaterial as an impeachment question, for the reason that this man was not a judge of his own condition.

Objection overruled; plaintiff allowed an exception.

A. He says there was no such conversation between him and Mrs. Tramontin about that, sending him up to Valdez.

Q. Is it not a fact that shortly after you were brought to the company's temporary hospital at Ellamar, after the accident, that Mrs. Tramontin, the nurse, bandaged your arm up this way (indicating) with adhesive bandages, running over your shoulder and around your body, holding your arm firmly and it [74] remained that way, in that position, for about two weeks?

A. He says no—his arm was in this position after the first bandage (indicating).

Q. Is it not a fact that you left the company's temporary hospital after you were there something over three whole weeks and you told Mrs. Tramontin, the nurse, at the time that you were going over

(Testimony of Tony Possus.)

to the bunk-house, where you would have some of the boys to talk to?

Mr. RITCHIE.—Is that intended for an impeaching question?

Mr. DONOHOE.—No, that is not an impeaching question.

A. He says he has not left the hospital of his own accord, he says he was ordered by Mr. Gedney to leave the hospital.

Q. Did you not state to Mrs. Tramontin that you were going to the bunk-house where you would have some of the boys to talk to? A. No.

Q. At the time you left the hospital, the cut on your forehead was entirely healed, was it not—over your eye? A. It was not healed.

Q. It was not healed? A. No.

Q. Hadn't Mrs. Tramontin taken the stitches out before you left the hospital?

A. It was taken out three days after he was in the hospital—it was in the bunk-house.

Q. Where was he when Mrs. Tramontin took the stitches out of the cut over his eye?

A. At her house.

Q. Is that what is called the hospital?

By the COURT.—Was it her house or at the hospital?

A. He claims it was taken out twice—when he was in the hospital stitches were taken out and after at her place. [75]

Q. At the time you left the hospital, you were perfectly able to take care of yourself, were you not?

(Testimony of Tony Possus.)

You didn't need anybody to assist you in dressing?

A. No, he was not able.

Q. He wasn't able to put on his coat alone—you were not able to put on your coat alone at the time you left the hospital? A. No.

Q. You were not able to use your right arm in eating at the time you left the hospital?

A. He was using his left arm—wasn't able to use his right arm.

Q. Could you use your right arm in eating at all?

A. No.

Q. When did you first recover the use of your right arm to the extent that you could roll cigarettes with your right-hand?

A. He says in about twenty days he was able to roll a cigarette.

Q. About twenty days?

A. About twenty days, yes.

Q. Do you remember Doctor Duckwall examining you in the company's hospital on or about the tenth day of February, 1916?

A. Yes, sir, he remembers.

Q. Now, what did Doctor Duckwall have you do when he was examining you?

A. He said he was ordered to take his shirt off and Doctor Duckwall asked him if he could lift his arm and he said he wasn't able to lift it, and he was just twisting his arm back and forth like that (indicating) and that was all.

Q. Is it not a fact that at Doctor Duckwall's request you placed your right-hand on your left

(Testimony of Tony Possus.)

shoulder, crossing your breast with your arm in this position (indicating)? A. He says, no.

Q. Is it not a fact that at that examination, at Doctor Duckwall's [76] request, you placed your left hand on your right shoulder, with your arm across your breast, in this position (indicating)?

A. He says he was asked but he wasn't able to put his arm there.

Q. Is it not a fact that in that examination, at Doctor Duckwall's request, you placed both your arms in front of you, joining your fingers in front, so as to be even at the full length of your arm?

A. He says no.

Q. Is it not a fact that at that examination, at Doctor Duckwall's request, you extended your arms behind you, with the tips of your fingers together, of each hand, so as to measure the length?

A. He was asked to do it, but he was not able to do it.

Q. Is it not a fact that after the examination was over, you dressed yourself unassisted, putting on your shirt and vest and coat?

A. He was assisted by Mrs. Tramontin to dress.

Q. What did Doctor Duckwall tell you after he had completed his examination of you?

A. He says nothing was broken in his shoulder and he was sound and healthy.

Q. Is it not a fact that he also said you were just simply loafing? A. He says no.

Q. Now, how long was it after that examination by Doctor Duckwall when you left Ellamar?

(Testimony of Tony Possus.)

A. He says it was one day after the examination he was thrown out of the bunk-house there.

Mr. DONOHOE.—We move to strike the answer as not responsive.

The COURT.—The answer may be stricken.

(Question repeated.)

A. He left Ellamar five days after the examination.

Q. Where did you go? [77]

A. Came to Valdez.

Q. After arriving in Valdez, did you consult any physician in Valdez in regard to your right shoulder or clavicle?

A. He says he was examined by some physician but he has forgotten his name—he don't remember his name.

Q. Was it the physician whose office you were in yesterday afternoon—Doctor Boyle?

A. No, it was another doctor.

Q. Was it Doctor Winans, who is in the same building where your attorneys have their offices?

A. No, it was not in the same building—he says the doctor that examined him wore glasses, he says he don't know the name—he don't remember the name.

Q. What did that doctor tell you as to your condition?

A. He was telling him he would have to perform an operation on his shoulder.

Q. Do you claim you were suffering pain all that time? A. Yes, sir.

(Testimony of Tony Possus.)

Q. And the doctor told you that he could not relieve that pain without performing an operation, did he? A. Yes, sir.

Q. And you don't know the name of that doctor, or where his office was?

A. He said he was examined by Doctor Boyle the second time, but he don't remember the other name.

Q. When were you examined by Doctor Boyle?

A. He says it was a very short time afterwards.

Q. A very short time after you came from Ellamar?

A. He says Doctor Boyle wasn't in Valdez at that time but he came shortly afterwards and he was examining him when he came to Valdez.

Q. Can you fix the date or about the date when you were examined [78] by Doctor Boyle?

A. He says he don't remember.

Q. Was it in the month of February, 1916?

A. He says in the summer-time.

Q. Then after leaving Ellamar, about the 14th of February, 1916, you didn't consult any doctor but this one whose name you do not remember and where his office is you don't remember, until some time in the summer of 1916, when you consulted Doctor Boyle—is that correct?

A. He says there was nobody examined him until Doctor Boyle came to Valdez.

Q. And was that in the month of July?

A. He says he don't remember the date or the month when it was—it was some time during the summer.

(Testimony of Tony Possus.)

Q. And during all this time, until Doctor Boyle examined you, you were suffering intense pain in that shoulder—you claim you were suffering intense pain in your right shoulder from the time you left Ellamar until Doctor Boyle examined you?

A. He says his arm was paining all the time.

Q. Now, what did Doctor Boyle tell you was your trouble?

A. Doctor Boyle said to him, the arm would have to be broken over again and reset.

Q. The arm would have to be broken over again and reset? A. Yes.

Q. You are positive that Doctor Boyle told you that, are you? A. Yes.

Q. And Doctor Boyle told you that there was no relief for you but to break your arm over again and reset it—is that right? A. He says yes.

Q. Did he suggest to you massage treatment of the muscles of your shoulder and around your right clavicle and hot applications? [79]

A. He says he was suggesting that, telling him that.

Q. Why didn't you have him treat you that way?

A. He says he wasn't treating him that way—he says he wasn't given that course of treatment because he was short of money and he wasn't able to pay for it.

Q. You went to Cordova, did you not, some time in the month of March, 1916, to consult a physician there regarding your right shoulder or right clavicle?

(Testimony of Tony Possus.)

A. He went in the month of March, he went to Cordova.

Q. Doctor Chase examined you in Cordova, did he not?

A. Doctor Chase and some other doctor—Doctor Council, he says.

Q. Did Doctor Chase take an X-ray of your right clavicle, take a picture with the X-ray?

A. Yes, sir.

Q. What did Doctor Chase tell you was the matter with you? A. He said his shoulder was broken.

Q. He told you that your shoulder was broken?

A. Yes, sir.

Q. You are sure of that, are you?

A. Yes, sir, he is sure of that.

Q. What did he suggest, what did Doctor Chase tell you ought to be done to your shoulder?

A. He said it would have to be broken over and reset it again—that is the words that Doctor Chase told him.

Q. Now, in the month of April, 1916, the defendant company requested you to come to Ellamar, did they not, so their doctor might examine your shoulder, take an X-ray of it? A. He says yes.

Q. And they offered to treat you in their hospital at Ellamar free of any charge to you, did they not?

A. Yes, sir, he was asked to stay there. [80]

Q. And you refused to go, is that not a fact?

A. Yes, he refused to go.

Q. Now, then, in the month of August the defendant company again requested you to come to Ellamar

(Testimony of Tony Possus.)

for examination and treatment, did they not?

A. He said he was asked only once to go there.

Q. Didn't your attorney write you, notifying you—didn't your attorney, Mr. Ritchie, notify you in the month of April, 1916, that the company requested you to come to Ellamar for examination and treatment for any injuries you might have?

A. Yes, he was asked by Mr. Ritchie.

Q. Then again you were asked in August, at the time you did go, were you not?

A. He says he went the second time when he was asked.

Q. He went the second time? A. Yes.

Q. And Doctor Gross examined you there, did he?

A. Yes, he was examined by him.

Q. And he offered at that time to give you free treatment until he cured any soreness in your shoulder? A. Yes, he was asked.

Q. And you refused to stay there and be treated?

A. He says he refused because he was afraid.

Q. What were you afraid of?

A. He was afraid of getting the treatment that was there at the hospital and the camp and that was the reason he refused to stay there and get treatment.

Q. Is it not a fact the reason you refused to stay was because you demanded the company pay you \$2,500 and you refused to take treatment because they wouldn't pay it to you? [81]

A. He says he was afraid to go to the hospital because the treatment was so bad the first time when he

(Testimony of Tony Possus.)

got hurt and he couldn't understand the second question right.

Q. Didn't you demand of the company at that time \$2,500?

A. He said that Mr. Middlecamp asked him what he wanted for a settlement and he said if he would give him \$2,500 for his injuries, that was all he wanted—that was his answer, and expenses.

Q. Mr. Middlecamp at that time offered you free board and lodging and treatment by the company's doctor and hospital and everything, if you would stay there to be treated? A. Yes, sir.

Q. And you refused to stay there, is that correct?

A. Yes, sir.

Q. Now, in that examination, didn't the doctor request you and didn't you place your right hand on your left shoulder, across your breast, in about this position (indicating)?

A. He was asked to by the doctor.

Q. Did he do it? A. No.

Q. You couldn't do it? A. No.

Q. Did you put your left hand on your right shoulder, with your arm across your breast, in this position (indicating)?

A. He says he was able to put the left hand on the right shoulder.

Q. Is it not a fact that Doctor Gross requested you to extend out your arms, both arms in front of you, with your fingers together, at full arms'-length?

A. He says no.

Q. Is it not a fact that at the doctor's request you

(Testimony of Tony Possus.)

extended your arms in a similar position behind your back? A. He says no. [82]

Q. Is it not a fact that at the examination which took place yesterday at Doctor Boyle's office of yourself that you complained of the pain being on the top of your right shoulder, about the point of your right shoulder, there on top? A. Yes, sir.

Q. What doctor did you consult with last night after that examination was over? A. Nobody.

Q. You didn't have any talk with Doctor Boyle or Doctor Winans after that examination was over?

A. No, he wasn't having no conversation with no doctor.

Q. Is it not a fact that the first time you complained of pain over your right clavicle was in the courtroom here to-day? A. He says no.

Q. Where did you complain of the pain being at that point previous to to-day?

A. He says he complained in Ellamar about the pain in the shoulder.

Q. To whom? Doctor Gross?

A. Doctor Gross, yes.

Q. Did you complain at that time that the pain was over the right clavicle, as you did to-day—is it not a fact that you complained that there was a pain on the top of your right shoulder?

Mr. RITCHIE.—We object to the question unless he knows the meaning of the word "clavicle."

The COURT.—Do you understand the question, Mr. Seminoff?

(Testimony of Tony Possus.)

The INTERPRETER.—Yes, sir, I understand the question.

The COURT.—He may answer.

A. He says it pained him more over the clavicle than it does on top of the shoulder.

Q. Did you ever have rheumatism?

A. No. [83]

(By Mr. RITCHIE.)

Q. Were you ever injured in that shoulder before?

A. No.

Q. Did you ever have anything wrong with it at all?

A. He says he was not sick in his life, his whole life.

Q. The question is— Did he ever have anything wrong with that shoulder before? A. No.

Q. You never had a sprain or had rheumatism or anything in it? A. No.

Q. Now, a while ago you stated, in answer to a direct question from Mr. Donohoe, that it was in 1914 that you last sent money to your mother; you had previously stated that it was just before you came to Alaska from Utah and you have also stated that you came to Alaska from Utah in 1915— Now, which is correct?

Mr. DONOHOE.—We object to that question on the ground that it is leading and on the ground that the original answer might be correct.

The COURT.—Put the direct question to him when he last sent money to his mother.

Q. When did you last send money to your mother?

(Testimony of Tony Possus.)

A. He says some time the first part of May from Salt Lake City.

Q. How long was that before you came to Alaska?

A. Just a month.

Q. You came to Alaska soon after you quit working near Midway, Utah, did you? A. Yes, sir.

Q. Mr. Donohoe was interested in your ability to roll cigarettes— How long was it after you were hurt before you were able to roll cigarettes for yourself? A. It was about twenty days.

Q. Prior to that, could you use your arm to any extent? [84]

Q. How many men were employed at the Ellamar mine when you were hurt?

A. Somewhere between seventy and eighty, maybe a little less—he didn't know the exact number.

Q. When Doctor Duckwall was down there, just what exercises did he put you through?

A. He says he wasn't exercising at all.

Q. What motions did he ask you to make with either arm?

A. The doctor was holding his arm and was lifting it himself, but he was not able to lift it.

Q. When the doctor asked you to put your arm in a certain position and you were unable to do it, did he take hold of it and move it there himself?

A. He said he could bring his arm as far as half way to the shoulder.

Q. Who was present when Doctor Duckwall examined you? A. Mrs. Tramontin.

Q. Did you take off your clothing from your shoulder?

(Testimony of Tony Possus.)

A. He says she was helping him take his shirt off.

Q. Was he then staying in bed?

A. He was in a standing position.

Q. That was after he had gone to the bunk-house?

A. Yes.

Q. He was able to walk around then and was fully dressed, was he? A. Yes.

Q. Now, ask him again, did he strip to the waist when the doctor examined him?

A. Yes, he was taking all his clothes off.

Q. Taking off all his clothes, his shirt and everything above the waist? A. Yes, sir.

Q. How much time did the doctor take examining him? [85]

A. He says between three and four minutes only.

Q. Mr. Donohoe asked you in regard to certain motions that Doctor Duckwall wanted you to make, putting your arms in certain positions— Did he ask you to make any other motions than those Mr. Donohoe asked about? A. He says no.

Q. Did he ask you to raise your right arm above your shoulder or try to do it?

A. He says he asked about it, he asked to, but he wasn't able to lift it.

Q. What examination did he make of your right shoulder?

A. He says just lifting the arms up over my shoulders and that is all there was to examining him.

Q. Did he feel the shoulder carefully with his own hands? A. Yes.

Q. Did he ask you where you suffered pain, if any?

(Testimony of Tony Possus.)

A. He wasn't asking him the place where the pain was—he just put his hand over his shoulder.

Q. Did he say anything to him about the bones?

A. He says he wasn't asking him at all.

Q. Did he say anything to him about a bone being broken or not?

A. He didn't say anything—he said you are strong and healthy—there is nothing the matter with you.

Q. He told him he was able to go to work?

A. Yes, sir, he told him he was able to go to work.

Q. And anything wrong with him was in the imagination— Now, do you know what the scapula is, how far it extends? Put your left hand, if you can, on your right shoulder and indicate where the scapula is?

(Witness does so.)

Q. Now, do you know where the clavicle is? Do you know the difference [86] between the scapula and clavicle? A. He says he knows it.

Q. You don't know the exact day when you came to Valdez from Ellamar?

A. He don't remember.

Q. Except that you told Mr. Donohoe it was about five days after Doctor Duckwall examined you?

A. Five days after he was examined by Doctor Duckwall.

Q. How long had you been in Valdez before you went to a doctor?

A. He says he was three days in town when he went to see a doctor.

(Testimony of Tony Possus.)

Q. Where did you see that doctor, where was his office?

A. He says right in this street—there was a big house over here, close by.

Q. Was it Doctor Dalton?

A. Yes, sir, Doctor Dalton.

Q. Was he the first doctor you saw?

A. Yes, that was the first doctor he was examined by.

Q. That is up here? A. Yes, sir, in Valdez.

Q. And that is the doctor you were trying to think of when Mr. Donohoe was asking you about the examination the doctors made?

A. He says, there was another doctor, it wasn't Mr. Dalton.

Q. The first doctor you consulted was Doctor Dalton, who lived in a large house in a side street here, was it? A. It was Doctor Dalton.

Q. Now, afterwards, before you went to Cordova, did you consult another doctor in this town?

A. He says there was a doctor examining him but he don't remember his name, after Doctor Dalton examined him.

Q. After Doctor Dalton examined him, you went to another doctor in town? A. Yes. [87]

Q. Where was his office?

A. He says, where the drugstore was.

Q. Did you ever consult any doctor in the same building where our office is?

A. Yes, he was examined by some doctor who was in the same building that your office is.

(Testimony of Tony Possus.)

Q. Was that Doctor Winans?

A. Yes, Doctor Winans.

Q. The doctor that was in Doctor Boyle's office with the rest of them yesterday when they took the X-ray of you— Do you know that gentleman sitting by the door back there? A. Yes, sir.

Q. Who is that? Is that the doctor in our building that you consulted last spring?

A. Yes, that is the doctor.

Q. Doctor Winans. Now, what did Doctor Dalton tell you about your shoulder, the first doctor?

A. He says he was bandaged up and his arm was put up like that and he was kept that way for three days.

Q. Doctor Dalton fixed up his shoulder that way, put it in a bandage? A. Yes, sir.

Q. When you saw Doctor Winans, what did he say to you?

A. He said Doctor Winans asked him to bandage up very tightly and it might help his broken parts.

Q. Did either one of these doctors, Doctor Dalton or Doctor Winans, talk about having an X-ray taken of you, suggest it to you? A. Yes.

Q. Is that the reason you went to Cordova and had the X-ray taken? A. Yes, sir.

Q. Who was present when the X-ray was taken in Cordova?

A. He says Doctor Chase and another doctor, he couldn't remember his name. [88]

Q. He did name him a while ago—wasn't it Doctor Council? A. Yes, Doctor Council.

(Testimony of Tony Possus.)

Q. Did both of those gentlemen examine your shoulder? A. Yes, they examined his shoulder.

Q. And they took the X-ray together?

A. Yes, sir.

Q. When they asked you to go to Ellamar in April, how was that request made to you?

A. Through you, he says, Mr. Ritchie.

Mr. RITCHIE.—At this time, since a request was made in writing and is so treated by the defendant, I wish to read into the record the letter.

Mr. DONOHOE.—It will be introduced in evidence when we come to our defense. It is in the record, in the complaint, anyway. The whole correspondence will be introduced.

Mr. RITCHIE.—Very well.

Q. You say the request for you to go to Ellamar came through me? A. Yes, sir.

Mr. RITCHIE.—It is admitted that the letter or at least a copy of the letter came to me?

Mr. DONOHOE.—Yes.

Q. You have told Mr. Donohoe that you refused to go, admitted that you refused to go and you gave him the reason why you refused to go?

A. Yes, sir.

Q. You stated to Mr. Donohoe, as I understand you, that it was on account of the treatment you received before you left Ellamar—that was your reason for not wanting to go back?

A. Yes, that was his reason.

Q. Why did you leave Ellamar when you finally came away?

(Testimony of Tony Possus.)

A. He says he left Ellamar because they didn't treat him right in [89] the hospital up there.

Q. Why did you leave the bunk-house and go to Jim Fielder's?

Mr. DONOHOE.—We object that that as repetition.

The COURT.—He may answer.

Objection overuled; defendant allowed an exception.

A. He was ordered out from the bunk-house.

Q. You testified to that—by Mr. Gedney?

Mr. DONOHOE.—We object to that.

Q. Who ordered you out of the bunk-house?

A. Mr. Estey.

Q. Where did you have the conversation with Mr. Estey? A. He was asked to come to the office.

Q. He was asked to come to the office? A. Yes.

Q. Did he go? A. Yes, he went to the office.

Q. That is the office of the company, where Mr. Estey was? A. Yes, sir.

Q. Now tell what conversation took place between you and Mr. Estey there?

A. He says he was asked—

Q. Give the exact words if you can?

A. Mr. Estey was telling him to go to work, why didn't he go to work; Mr. Estey was asking him, why didn't he go to work.

Q. Then what else was said?

A. And then Tony said, I am not able to work and Mr. Estey opened the door and told him to get out.

(Testimony of Tony Possus.)

Q. What did he say—tell him to give the exact words Mr. Estey used if he remembers?

Mr. DONOHOE.—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey. [90]

The COURT.—He may answer. The objection will be overruled and exception allowed.

Q. What did Mr. Estey say to him?

A. He said, “Get out of here, you Bohunk son-of-a-bitch”—that is just what he said.

Q. And then did you get out?

A. Yes, he said he left.

Q. Is that one reason why he didn’t want to go back to Ellamar? A. Yes, sir.

(By Mr. DONOHOE.)

Q. Now, when this conversation between you and Mr. Estey took place in the office of the company at Ellamar, that was after Mr. Duckwall, Doctor Duckwall, had made his examination of you, was it not?

A. It was the second day after he got examined by Doctor Duckwall.

Q. You said something about Doctor Winans—what did Doctor Winans advise you as to the injury to your right shoulder?

A. He says he was tied for three days and then his arm turns black and then he took that bandage off.

Q. Who put that bandage on, Doctor Winans?

A. Doctor Winans.

Q. Did Doctor Dalton put any bandage on your arm? A. He says no.

Q. Did Doctor Winans tell you that it was neces-

(Testimony of Tony Possus.)

sary for you to have your shoulder broken and reset?

A. He said yes, he was telling him that.

Q. Did he tell you, when he took that bandage off, that he couldn't give you any further relief except by an operation?

A. He says, yes, he was telling him that way.
[91]

Q. He couldn't do anything for him except by an operation? A. Yes.

Q. And he offered to perform an operation upon your shoulder? A. No, he wasn't asked to do it.

Q. Did Doctor Dalton offer to perform an operation upon your shoulder?

A. He says that the first doctor that examined him, Doctor Dalton, was asking him to have performed an operation—Doctor Dalton, the first doctor that examined him; he asked him to perform the operation.

Q. What did the doctor say—the doctor said he would have to have an operation performed?

A. Yes, sir.

Q. Did Doctor Boyle tell him it was necessary to have an operation performed in order to remedy the defects of the clavicle?

A. Yes, sir; Doctor Boyle was telling him.

Q. And did Doctor Boyle offer to perform the operation?

A. Yes; Doctor Boyle was offering to perform the operation.

Q. How much of a fee did Doctor Boyle say he would charge him for it?

(Testimony of Tony Possus.)

A. He said maybe three hundred dollars, or maybe four or five hundred dollars. He don't know what it was, but it was over three hundred dollars.

Q. Did he explain to him what he proposed to do in this operation?

A. Yes, the doctor told him he was going to perform the operation.

Q. What did he say he would do?

A. He said he would have to break them over again and clean the two parts of it and put some silver wire inside, something like that—that is what he explained.

Q. Some silver wire? A. Yes, inside of him.

Q. At this time the doctor told him his clavicle was healed, did [92] he not, bound together?

A. He said he don't remember his telling him that.

Q. Doctor Dalton told him he would have to break the bone in his clavicle, did he?

A. Doctor Dalton was telling him that he would have to break it.

Q. When you went to see Doctor Dalton, it was three days after you came over from Ellamar and you left Ellamar five days after Doctor Duckwall examined you? And when you came to Doctor Dalton's place, Doctor Dalton told you that it was necessary to break the bone and reset it—is that right? A. He don't understand exactly.

Q. You went to Doctor Dalton three days after you arrived in Valdez from Ellamar?

The COURT.—He has already testified to that.

Q. When you went to Doctor Dalton, did he tell

(Testimony of Tony Possus.)

you that it was necessary to break the clavicle bone and reset it? A. He says yes.

Witness excused.

WHEREUPON court adjourned until to-morrow (Friday) morning at ten o'clock. [93]

Friday, January 5, 1917—Morning Session.

Testimony of Frank M. Boyle, for Plaintiff.

FRANK M. BOYLE, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. What is your name? A. Frank M. Boyle.

Q. Where do you reside?

A. I am a resident of Valdez.

Q. How long have you lived in Valdez?

A. I have lived in Valdez for a period of fourteen years and a half.

Q. What is your business or profession?

A. I am a practicing physician and surgeon.

Q. Are you a graduate of a medical school?

A. I am.

Q. What institution?

A. I am a graduate of the Medical Chirurgical College of Philadelphia.

Q. What year did you graduate?

A. In the year 1895.

Q. Have you been engaged in the practice ever since?

A. With the exception of two or three years I have been engaged in the practice of my profession.

Q. Where did you practice before you came to Alaska?

(Testimony of Frank M. Boyle.)

A. I was practicing in the Yukon Territory and in British Columbia.

Q. Are you acquainted with the plaintiff here, Tony Possus? A. Yes, sir.

Q. Did you ever treat him or examine his professionally?

A. I first examined the plaintiff Possus last July. I have seen him two or three or three or four times since then.

Q. State what examination you made last July, and what condition you [94] found him in, if anything other than normal?

A. The examination made last July revealed a fracture of the right clavicle at the outer third, with a partial overlapping.

Q. You say you have examined him several times since? A. Yes, sir.

Q. Has the condition of that changed at all since then? A. No, not perceptibly.

Q. It is in practically the same condition now as it was then? A. Yes.

Q. Will you take Mr. Possus up there before the jury and have him take off his shirt and point out to the jury the abnormalities, if any, that existed in his right clavicle or shoulder?

A. Yes, sir. Do you wish me to demonstrate to the jury this condition?

Q. Yes; I wish you would point out first what you say is an abnormal or unusual condition. Is it the result of an accident or not, any unusual condition there? A. That would be my presumption.

(Testimony of Frank M. Boyle.)

Q. Now, point out how it is out of the normal as you regard it?

(The plaintiff comes forward and removes his shirt.)

A. This is the right clavicle, extending from the sternum here out to the shoulder. Of course, this is the duplicate, the left clavicle on the opposite side. You can palpate this by doing what I am doing here. An examination of this right clavicle reveals a break at what is known as the outer third and I will now imbed my finger in that break. There is the break. This is the end of the clavicle here, where my thumb points. Now, on the opposite side we have a normal clavicle which will afford us a basis of comparison. You will find here that there is no condition of that sort exists the same as there does here on [95] this side, that is to say, this clavicle is quite normal. Furthermore an examination reveals that there is a shortening of this right clavicle of approximately three-eighths of an inch and that shortening, in my opinion, is due to this partial overlapping here at this break. Now, I will demonstrate to you further—between my upper and lower fingers here, I have this clavicle right between my fingers and you can see the width there. That unusual width is due to the callous and the partial overlapping there. This is the break here where my finger is buried.

Now, on the opposite side here you will see the contour of the clavicle there, and you will notice the difference in the width of the clavicle here and the clavicle here is quite noticeable. My fingers are on

(Testimony of Frank M. Boyle.)

the upper and lower side of this clavicle—that demonstrates the thickening there at the break and where there is partial overlapping.

Q. I want to ask you a question. Will you indicate where is the outer end of the clavicle—it connects there with the scapula or shoulder blade?

A. Yes. This clavicle or shoulder blade articulates with the shoulder blade here—the collar-bone, rather, articulates with the shoulder blade back here. This is a very complicated joint, the shoulder joint, and it is very difficult to describe unless I have an anatomical specimen here to illustrate. This point articulates with what is known as the acromial process of the shoulder blade, about in here.

Q. As I understand you, there is an opening or depression in the collar-bone, near the outer end?

A. Right here where my finger is now.

Q. Now, on the other side is the collar-bone or clavicle perfectly [96] smooth and straight across there?

A. Well, it is not perfectly smooth and straight—it is a normal clavicle.

Q. Is there any depression here similar to the one there? A. No, there is not.

Q. Is that an abnormal depression or could it be natural?

A. It is an abnormal condition there, the result of what I consider has been a fracture.

Q. Will you explain what you mean by an overlapping?

A. By an overlapping I mean that the bone

(Testimony of Frank M. Boyle.)

partially overlaps like this (indicating). Unfortunately an X-ray picture does not reveal that overlapping. It is an interior and posterior picture and may not reveal an overlapping.

Q. If there are two ends of bones protruding past each other—that is the condition, is it not?

A. Yes.

Q. Are the ends horizontal to each other or perpendicular to each other? Are they like this or like that (indicating)?

A. They are like this more (indicating)—looking at them this way, anteriorly and posteriorly, like this.

Q. They are on the same horizontal plane?

A. Yes.

Q. Not one vertically over the other? A. No.

Mr. RITCHIE.—I would like to have any member of the jury, if they wish to do so, come and place their fingers on the plaintiff's right and left clavicle at the same time and let Doctor Boyle indicate the condition which he states is there—if any of you gentlemen wish to do it, or if you are satisfied with the statement of the doctor, all right.

Q. Have you any cuts here in Gray's Anatomy which would illustrate [97] this more clearly than your statement?

A. Yes, there is an illustration in this anatomy.

Q. Take that and show it to the jury and make any explanation you consider necessary—is that a late edition?

A. Yes, that is one of the late editions. This is

(Testimony of Frank M. Boyle.)

an illustration here of the clavicle.

Mr. DONOHOE.—Is that going to be introduced in evidence, the whole book?

Mr. RITCHIE.—Not the whole book.

The WITNESS.—I would not object to having the page removed and it can be replaced.

Mr. DONOHOE.—If the doctor hasn't any objection to removing that page, the writing can be cut out and the page can be put in if it becomes necessary.

Mr. RITCHIE.—If it is satisfactory to counsel, we will stipulate that unless we can get a substitute for the record, that page may be removed for the record.

The COURT.—The writing would not properly be a part of it. Give the stenographer the number of the page.

Mr. RITCHIE.—It is page 170, of Gray's Anatomy.

Q. Use that cut as an illustration, Doctor—you may explain by means of the cut.

A. This is a picture of the clavicle or collar-bone; this is the sternal end, that is the end that articulates with the chest bone and this is what is known as the cranial end, or the end that articulates with the shoulder joint. Now this fracture is approximately here, across here, in what is known as the outer third. This is a picture of the left clavicle and this is an anterior picture and this a posterior, that is, one a picture from the front and one a picture from the back of the same collar-bone, [98] and this is approximately where the fracture has taken place.

(Testimony of Frank M. Boyle.)

Q. I have here a rubber eraser, which has been broken in two. Will you illustrate, will you take that as the clavicle which you say has been fractured and indicate, holding it up before the jury, just how and to what extent that overlapping exists?

Mr. DONOHOE.—We object to that; the doctor has already explained that by use of his fingers.

Objection sustained; plaintiff allowed an exception to the ruling.

Q. I understand, Doctor, that those ends of the bone overlap on the same horizontal plane. Now, will you kindly put your finger there and state whether either end of the bone can be felt there, that is, if the protruding end of the bone can be felt there?

A. My thumb now is up against one end of the bone, as you see here. My opposite finger is approximately at the end of the clavicle, which is here, and my thumb is up against the broken end of the clavicle.

Q. Now, is the inner end of the clavicle on the front side of the outer end as they overlap, that is, using my finger as an illustration, are they that way or that way (indicating)?

A. The other end of the clavicle is behind this end here as far as I can determine, here, right in here. Now, I have got the two broken ends there in between my fingers and I have got hold of the normal clavicle on the opposite side here, and that will give you an idea of the condition there.

Mr. RITCHIE.—That is all with the plaintiff at this time, unless you wish to make a further explanation.

(Testimony of Frank M. Boyle.)

Mr. DONOHOE.—The defendant states that he expects the plaintiff to be present when it comes to our defense in the case. (Plaintiff takes his seat.)

Q. You stated a while ago that the right clavicle is approximately [99] three-eighths of an inch shorter than the left clavicle? A. Yes.

Q. Is that a normal condition?

A. No, it is not a normal condition. In a right-handed person the right clavicle is usually longer than the left clavicle—in the case of the plaintiff there, there is a shortening of the right clavicle or collar-bone which I attribute to this overlapping.

Q. You, of course, do not know the cause of this condition? A. No.

Q. Except as it has been told to you? A. No.

Q. Can you form any reasonable estimate as to the length of time that condition has existed?

A. Well, I cannot—it might have existed six months or several years,—I couldn't state with any degree of accuracy the exact length of time the condition has existed.

Q. What is the probable cause of that?

A. I would say the probable cause was a direct violence.

Q. Something like a violent blow? A. Yes.

Q. Now, has that condition materially changed since you first examined the plaintiff? A. No.

Q. It has been practically the same?

A. There is no appreciable difference in the condition now and when I first examined him.

Q. You have examined him at intervals several

(Testimony of Frank M. Boyle.)

times? A. Yes, sir.

Q. Now, what is the present result of that injury, what effect does [100] it have upon his physical condition, his muscular strength and his ability to use his shoulder, if any?

A. There is an appreciable impairment there of the use of the right arm.

Q. Explain the difficulty—is he unable to use—

Mr. DONOHOE.—We object to that as leading.

The COURT.—You may explain the impairment.

A. The examination reveals that the plaintiff has difficulty in raising his right arm. Now, I have carefully considered the fact that this man may be malingering, may be exaggerating, and I was inclined to believe that when he first came under my observation and I have watched him on the street at times and I have, up to the present time, made three or four, maybe four or five examinations, and I came to the conclusion that there is an impairment of that arm there.

Q. Now, just state a little more fully how it is affected or impaired, how it would affect or impair the use of his shoulder. State what he is unable to do that he might do if he had his normal strength.

A. Well, following the vocation of manual labor, he is under a great handicap in attempting to lift or do any hard work.

Q. Could he raise his right arm high above his shoulder so as to use it?

A. I have tested him out in that way different times, and he has great difficulty in doing it, and can

(Testimony of Frank M. Boyle.)

only do it with the assistance of his opposite arm.

Q. Does the attempted use of his shoulder cause him any apparent pain? A. Yes.

Q. Now, Doctor, you and Doctor Gross and Doctor Winans and Doctor [101] Newlove of Fort Liscom, took an X-ray in your office the other day of plaintiff's shoulder, did you not? A. Yes.

Q. I don't know whether I have the right one or not—is that the one?

A. Yes; this is an X-ray picture of the plaintiff's right shoulder.

Q. Taken about two or three days ago?

A. Yes, taken at the request of Mr. Donohoe.

Q. Now, can you hold that before the light so that the jury can see it?

A. Yes; this is an X-ray picture of the plaintiff's right shoulder. This, what you see here in the humerus, this bone here (indicating). This is the head of the bone. This is the clavicle or collar-bone here, this coming along here. It doesn't show the entire collar bone, but it shows the area where the fracture exists and an examination of this at this point shows a thickening of the collar-bone, which you can observe there, a sort of bellying out like from below. It is not very noticeable, however. There is the point where the fracture exists.

Q. Does the X-ray show this overlapping that you speak of? A. No, it does not.

Q. Will you explain why it does not?

The COURT.—I think that has been answered.

Mr. RITCHIE.—We offer the plate in evidence.

(Testimony of Frank M. Boyle.)

It is admitted, without objection, marked Plaintiff's Exhibit "A" and made a part of this record.

The COURT.—You do not have a print from it?

Mr. RITCHIE.—No. Could an ordinary photographer make a print of this, Doctor Gross?

A. Yes, I think so.

Mr. RITCHIE.—I think we can agree upon that hereafter.

The COURT.—If you can agree upon a print being made, the print may [102] be substituted for the plate. For the present this plate may be admitted as Plaintiff's Exhibit "A."

Q. You stated a while ago that in a right-handed person the right clavicle is usually slightly longer than the left—that statement is made on medical authority, is it?

A. Well, that is my observation, and it is sustained by medical authority. I think you will find reference to it in the book of anatomy there on the subject of clavicles.

Q. Now, Doctor, what do you think is going to be the ultimate result of this injury to plaintiff, will it get better or worse? What do you think will be the future condition of that arm as to strength and ability to use it, I mean the shoulder and that arm?

A. Well, I am inclined to believe that there will be more or less permanent impairment of the function of the right shoulder. If this man had the benefit of a masseur and could be under the care of such a man for a period of months, there might be some improvement brought about, the result of

(Testimony of Frank M. Boyle.)

manipulations and massage and the like.

Q. You think this use of the shoulder as to strength and pliability is permanently impaired?

A. I am inclined to that belief.

Q. And which is affected the more, the actual strength of the member or the pliability or flexibility of it?

A. The inability to manipulate the shoulder is where the principal impairment is, and, of course, there is pain.

Q. At the present time, could he make an over-hand throw like a baseball player, in the condition that shoulder is?

A. He might do so, yes, but with difficulty.

Q. I mean, could he raise his arm and throw over this way (indicating)?

A. He perhaps might be able to do so, but, as I say, it would be difficult [103] for him to do so.

Q. Now, will that condition improve?

A. As I have said, if he had the proper care and the aid of a professional masseur and all these modern aids, there might be some improvement produced and probably would be some improvement produced.

Q. In your opinion, was that bone properly set to grow together after the fracture?

Mr. DONOHOE.—We object to that on the ground that it is incompetent, irrelevant and immaterial, and is attempting to sustain the second cause of action; and we include in this objection, all the objections that have heretofore been made by us to introducing

(Testimony of Frank M. Boyle.)

any evidence as to the second cause of action.

The COURT.—The objection is overruled. The only question that occurs to the Court relative to the question as presented is this, that it has been testified that the accident occurred on the 12th of January and the witness on the stand now testifies that he first examined plaintiff in July. Your question is directed to whether or not it was properly set; there is a considerable lapse of time. I suppose it would go to the weight of it rather than the competency.

Mr. RITCHIE.—I don't imagine that Doctor Boyle or any other doctor would make any positive statement as to the physical condition that existed or that came into existence months before he saw the person, but it will go to the weight of the testimony.

The COURT.—He may answer—the Court is inclined to think that it goes to the weight of the evidence rather than the competency.

Defendant allowed an exception to the ruling.

A. No, it was not, in my opinion.

Q. From the appearance of it or from the feeling of it, are you or are you not of the opinion that it was a clean fracture, a comparatively [104] clean one, or a ragged one?

A. There has been considerable excess growth around the seat of the fracture and at this time, such a length of time has elapsed, that it would not be possible to accurately determine that fact.

Q. If there had been a clean fracture, comparatively clean one, and if it had been properly set by

(Testimony of Frank M. Boyle.)

a competent surgeon, would the bone grow together naturally? A. Yes.

Q. This, of course, is only an opinion—how long in your opinion, would it have been before the shoulder would have had its absolute normal strength, would it ever have recovered its normal strength?

Mr. DONOHOE.—We make the same objection.

Objection overruled; defendant allowed an exception.

A. A fracture of the clavicle or collar-bone does not necessarily result in any impairment of the function of the shoulder, if it is properly attended to and the broken fragments are brought into correct alignment—it is not a serious condition ordinarily.

Q. Is the clavicle an unusually strong bone or the opposite?

A. Well, considering its calibre and size, it is a strong bone—exposed as it is, it is quite frequently the seat of a fracture.

Q. Is it more than ordinarily exposed and subject to fracture? A. Yes, sir.

Q. More so than a great majority of the bones?

A. Yes, sir.

Q. Now, could you answer this question: Could you venture an opinion as to how long it should have been before that man entirely recovered, if it was an ordinary fracture and it was properly set and he had entirely recovered—how long would it have been?

Mr. DONOHOE.—We object to that question—it is not a hypothetical [105] question based on the testimony. The doctor has not testified that it was

(Testimony of Frank M. Boyle.)

an ordinary fracture—he said he couldn't testify whether it was a clean fracture or a ragged fracture and therefore the hypothetical question is not based on any testimony introduced in this case.

The COURT.—I don't understand the question.

Mr. RITCHIE.—The question is somewhat involved. I will *with* withdraw the question.

Q. I wish you to give an opinion, if you feel warranted by the facts, by your knowledge of the case, as to how long it should have been, with proper surgical care, before that man would have fully recovered?

A. A fracture of the clavicle, if the bones are placed in correct alignment, heals and unites within a period of three weeks and I would say, at the expiration of two months, under ordinary circumstances, the man ought to be entirely recovered from the effects of an injury of that character.

Mr. RITCHIE.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Have you ever treated a patient for a fractured clavicle? A. Yes.

Q. When?

A. Oh, I have had probably a dozen cases of my own of fractured clavicle and I have probably seen that many more of other physicians.

Q. Have you treated any in Valdez?

A. Yes, sir.

Q. Who?

A. Over at the Brown Alaska mine, over in Solomon Gulch, Solomon [106] Basin there were two

(Testimony of Frank M. Boyle.)

cases over there of fractured clavicle of employees of that company.

Q. What kind of treatment did you give them?

A. The treatment which I have always used in cases of a fractured clavicle is to get the broken fragments in correct alignment and we do that by putting on a Sayre dressing, or a modification of the Sayre dressing. That consist of a bandage, the aid of bandages and adhesive plasters, to elevate the elbow and lift up the shoulder and bring the arm up in this position, like this (indicating) and keep the shoulder up and backward and outward and immobilize it and keep it immobilized for a period of at least three weeks—that is the customary method.

Q. Where do you first attach this adhesive bandage you speak of—to what part of the anatomy do you first attach this adhesive bandage to get those results?

A. It is usully customary to place a strip of adhesive plaster, say three or four inches in width, immediately behind this arm, the purpose being to bring the arm back in that position (indicating), bring it around here and fasten it to the body like that (indicating); then a bandage is placed around here and around the opposite shoulder, right around the body and put under the elbow, and it is held in that position, as I say, immobilized. It is pretty hard for me to describe it to you.

Q. Now, when you first examined this man in July, he exhibited to you an X-ray picture taken by Doctor Chase of his shoulder, did he not?

(Testimony of Frank M. Boyle.)

A. Why, Mr. Ritchie gave me an X-ray picture that had been taken by Doctor Chase of Cordova, yes, sir.

Q. And also submitted to you a statement of Doctor Chase's opinion regarding this injury, did he not?

A. I don't think so—there was on this X-ray plate a little statement [107] to the effect that this picture had been taken by Doctor Chase.

Q. Didn't Mr. Ritchie at that time tell you that Doctor Chase claimed that there was a dislocation of the clavicle rather than a fracture?

A. No, he did not.

Q. He did not state that? A. No.

Q. Now, you say the X-ray pictures did not disclose the true condition of this bone at this time—is that correct?

A. The X-ray pictures that have been taken do not, only in so far as showing a slight enlargement at the seat of fracture.

Q. Do you at this time say that clavicle is broken now? A. No.

Q. And not fractured?

A. No, I say it has been fractured.

Q. You do not want the jury to understand from your explanation of the man's condition that the clavicle is at this time broken? A. I do not.

Q. Nor fractured? A. No.

Q. And it was not at the time you made your examination in July—it was not broken? A. No.

Q. You said something about an enlargement of

(Testimony of Frank M. Boyle.)

the bone at the seat of the original fracture—isn't that always the case when bones unite, that the place of union becomes enlarged?

A. Yes, that is quite usual.

Q. Now, where the most excellent results are obtained of a fractured clavicle, the place of union would be enlarged, would it not?

A. Yes, much the same way, you might unite a joint, as plumbers do— [108] at the seat of the junction of broken pipe, there is an enlargement there.

Q. Might not that enlargement you speak of be the natural result of the union of the clavicle where it was well set and good results obtained?

A. Not to the same extent as exists with the plaintiff's clavicle.

Q. How much would it be enlarged if the results were as good as are ordinarily obtained in a case of that kind?

A. Oh, there might be some enlargement, naturally.

Q. How much greater do you say this enlargement is than would be in the case of a good union?

A. In this enlargement, there is an overlapping of the bones and of course that increases the enlargement.

Q. How much is the increased enlargement?

A. Well, it is double or triple what it would ordinarily be, at least double what it would ordinarily be—there is a bony or osseous material around the parts.

(Testimony of Frank M. Boyle.)

Q. How much do you claim that is overlapping?

A. Well, a measurement of the right clavicle and a measurement of the left clavicle reveals a shortening of the right clavicle of three-eighths of an inch, fully three-eighths of an inch, probably more.

Q. Are you willing to stake your professional reputation on the statement that you can exactly measure the length of the clavicle, of each of the clavicles, of this plaintiff, owing to the fact that he has such heavy muscular tissue in that region?

A. Well, depending upon my sense of sight and my sense of touch, I would say yes.

Q. You feel certain you can positively measure the length of each of those clavicles in this man at this time? [109]

A. Yes and get an approximate conception as to the condition.

Q. Now, is it not a fact that the two clavicles of a great many normal persons, one is shorter than the other? A. Yes.

Q. Isn't it quite frequently true, that there is at least a quarter of an inch difference between the length of the clavicles? A. Yes.

Q. Did you give this man any treatment when he came here in July? A. No, I did not.

Q. Your testimony is not based then, as I understand it, upon an X-ray picture at all?

A. My testimony is largely based upon my special sense of sight and my special sense of touch, as far as the condition of this man's clavicle is concerned.

Q. Is it based any upon an X-ray picture?

(Testimony of Frank M. Boyle.)

A. Partially, yes.

Q. Is it based upon the X-ray picture which is now Plaintiff's Exhibit "A"?

A. This X-ray picture which I had here shows a slight enlargement there at the seat of fracture and bellying.

Q. I will ask you, Doctor, if in all cases where there is a fracture of the clavicle and the patient has been treated as you have suggested you would treat a patient for similar trouble, is there then never any overlapping of the ends of the bones?

A. If the parts are brought into correct alignment, there should be no overlapping.

Q. Did you in any of the cases you have treated never have any overlapping?

A. I have had overlapping in several cases I have treated, but it wasn't my fault.

Q. Then, when patients are sometimes treated by a skilled surgeon, there is sometimes overlapping of the ends, is there not? [110] A. Sometimes.

Q. Does the X-ray picture show any abnormal condition of the plaintiff's right clavicle?

A. It is hardly perceptible.

Q. Then for this abnormal condition which you have testified to, you rely almost entirely upon your sense of sight and feeling? A. Yes.

Q. Now, why, or on what do you base your opinion that this plaintiff at this time is suffering from a disability by reason of a fracture he did have in his right clavicle?

A. I have made several examinations of the plain-

(Testimony of Frank M. Boyle.)

tiff and I have satisfied myself from manipulating his shoulder and observing the man and studying the case that there is some impairment there of the function of that right shoulder.

Q. Now, from your scientific knowledge and surgical knowledge, what is the reason that the use of that shoulder is now impaired?

A. I cannot find any abnormality other than the shortening of that clavicle.

Q. Would the shortening of the clavicle necessarily cause any impairment of the shoulder?

A. In some instances it does and in some, it does not.

Q. You have known of cases, have you not, where the clavicle has been fractured and absolutely nothing done with it at all and it naturally grew together again? A. Yes, sir.

Q. The fracture of a clavicle is not considered a serious injury, is it? A. Ordinarily not.

Q. And you know of cases where the clavicle has reunited without [111] any service at all, do you not? A. Yes.

Q. Now, then, the only reason you can assign at this time why this man's shoulder should be impaired is because you find the right clavicle shorter than the left, is that right?

A. And the partial overlapping there.

Q. Would the partial overlapping of itself cause any impairment of the use of the shoulder?

A. It might—sometimes it does not.

Q. You cannot assign any physical reason why it

(Testimony of Frank M. Boyle.)

should, can you? A. No.

Q. You spoke of the plaintiff complaining of pain—is it not a fact that when yourself, Doctor Winans, Doctor Gross and Doctor Newlove made an examination of this plaintiff yesterday that he complained of pain in the back part of his shoulder rather than in the region of his clavicle?

A. I believe he did, yes.

Q. And he made no statement at that time that he suffered any pain in the region of the clavicle?

A. No, you can deeply manipulate the clavicle as I have done here and it doesn't elicit any pain, but when the arm is lifted up and certain muscles and certain tendons are brought into play, that does elicit pain.

Q. Did you raise his arm up yourself?

A. I have on several occasions.

Q. Did you the other day?

A. I believe I did once; yes.

Q. And you met with resistance, did you not, from the plaintiff when you went to raise it up?

A. Yes, he complained.

Q. Now, is it not a fact that that resistance came from the forearm [112] and from the muscles of the arm between the elbow and the shoulder?

A. No, as far as I could determine, there is no impairment of the function of the elbow—the trouble seems to be all in the shoulder.

Q. From raising his arm up, you could tell where the resistance came from? A. The shoulder joint.

Q. What is the condition of the muscle where pain

(Testimony of Frank M. Boyle.)

is caused—what is the instantaneous and voluntary condition of the muscles in the region of where the pain is caused?

A. There may sometimes exist a contraction or spasm of the muscles.

Q. Is it not a fact that immediately upon pain being produced, the muscles immediately harden and stiffen in the region of the place where the pain is caused? A. Not necessarily.

Q. Yet if by holding your hand over the muscles in the region of the clavicle and you raised up the plaintiff's arm and raising it up caused him pain in that region, you could tell immediately by the stiffening of the muscles in that region that that was where the pain was located, could you not?

A. No, you could not, if in the possible event that some of the smaller muscles, the lower layer of muscles, might be involved, that stiffening would not be transmitted so you could detect it by palpation or by feeling.

Q. I believe you testified that you found no tenderness in the region of the clavicle?

A. I could detect no tenderness.

Q. Now, if the patient was suffering from the present result to his right clavicle, would you not find tenderness and soreness in that region? [113]

A. Why, there might be, yes—of course you can't palpate the under side of a clavicle, only the upper and outer side—you can't get underneath it.

Q. You never advised this man that it was necessary for him to have a surgical operation, did you?

(Testimony of Frank M. Boyle.)

A. No, I did not.

Q. Your treatment of his present condition and of his condition as it was in July when you examined him would have been massage, with hot applications and liniment rubbed in, is that right?

A. Yes.

Q. That is the treatment you would have recommended for him?

A. Yes,—a surgical operation might possibly aid the condition, but I would be reluctant to recommend it.

Q. It is not the usual method of treatment for fractured clavicle, however, a surgical operation?

A. In cases where there is difficulty in keeping the parts in correct alignment and there is a marked overlapping and that overlapping cannot be corrected by appropriate splints and immobilizing the parts, it is oftentimes necessary to have a surgical operation and cut down on the broken ends and wire them together or as it is done nowadays more particularly, introducing little bony strips there and fastening them together that way with plugs.

Q. Do you recall now of ever performing a surgical operation in the case of a fractured clavicle?

A. I never have.

Q. And you have never seen one, that has come under your observation?

A. I have only seen one case and that was a compound fracture where a clavicle had broken and had penetrated the tissues.

Q. You don't consider this a case requiring a sur-

(Testimony of Frank M. Boyle.)

gical operation, do you?

A. I would be reluctant to suggest surgical interference until at [114] least such time as the man had had the benefit of careful massaging and the like, to see what results were accomplished in that way.

Q. When this man called upon you last July to make this examination of him, why didn't you treat him by massage treatment at that time?

A. He didn't come to me to receive professional treatment in that respect—he simply came to see me to have an examination made of his clavicle.

Q. Did you in the course of that examination recommend to him what would be a proper treatment for his present condition?

A. I said to him that it would be well for him to massage the parts—have them massaged and use liniments.

Q. And he didn't make any request of you to proceed to treat him, along those lines?

A. No, he did not.

Q. He just came to you for an examination and not for treatment? A. That is all.

Q. Do you know if any other doctor had treated him since he left Ellamar?

A. I do not, of my own knowledge.

Q. Is there any evidence which you have discovered in relation to this injury, other than the statement of the plaintiff himself, from which you could ascertain whether he is suffering pain from the use of his right arm at this time? A. Yes.

(Testimony of Frank M. Boyle.)

Q. What are they?

A. On attempting to manipulate the parts, the contour, the appearance of the man—it is quite evident that he is in pain and he will resist and pull away from me, and the expression of his countenance. [115]

Q. That is what you are basing your opinion on?

A. I am basing my opinion largely upon that and my observations of the man, covering a period of several months.

Q. You think he was suffering this same pain in July, do you not? A. I think he was, yes.

Q. And at that time you suggested to him that he could only get relief by means of massage and applications of liniment? A. Yes.

Q. And he didn't request you to give him any treatment? A. No, he did not say anything.

Q. Now, you, of course, compared the contour and position of the right shoulder and left shoulder of the plaintiff when you were making these examinations, did you? A. Yes.

Q. Did you discover any difference as to the appearance or contour of the two shoulders?

A. The irregularity was perceptible at the seat of fracture, as it is perceptible now.

Q. As to the position of the shoulders, what, if any, difference did you note?

A. An examination of the two shoulders doesn't show any appreciable difference.

Q. An examination of the two shoulders doesn't show any appreciable difference? A. No.

(Testimony of Frank M. Boyle.)

Q. They are both practically normal, are they—the position of the two shoulders?

A. With the exception that at the seat of fracture there is that irregularity there in the contour.

Q. Now, is it not a fact that if that right clavicle was shortened to any perceptible degree, that it would cause a drooping forward [116] of the right shoulder?

A. Sometimes there is a drooping forward of the right shoulder as the result of fracture.

Q. If that right shoulder was shortened to any perceptible degree would it not cause a drooping of the right shoulder forward?

A. It might and might not—sometimes it does and sometimes it does not.

Q. If the right clavicle was shortened three-eighths of an inch would it not cause a forward drooping of the right shoulder?

A. Not necessarily,—it might do so and might not be perceptible; this man is very well developed muscularly and a comparison of the two shoulders doesn't show any appreciable difference, that is manifest.

Q. As to this overlapping, as I understand you, you base your opinion that there is an overlapping there on your feeling and your sight rather than on the X-ray picture? A. Yes.

Mr. DONOHUE.—That will be all.

(Testimony of Frank M. Boyle.)

Redirect.

(By Mr. RITCHIE.)

Q. Mr. Donohoe has asked you a good deal about this overlapping and you have stated as I understand it that the existing condition of the plaintiff in overlapping is not natural? A. It is not natural.

Q. Would that overlapping have been as extensive as it is if the bone had been properly set in the first place?

A. If the bone had been properly set and the fracture was corrected and the parts were put in correct alignment, there ought not to have been any overlapping.

Q. The other day when the doctors were taking the X-ray in your office, [117] did or did not all of you measure the two clavicles?

A. Well, we were all present when the measurements were taken—I think Doctor Winans took the measurements and I took them I know.

Q. All the doctors saw the measurements?

A. I think so, I am not certain as to that.

Q. Now, about this possible operation to correct whatever is wrong with the clavicle, anything that is grossly wrong with it—you told Mr. Donohoe that that wasn't usual and perhaps not very often necessary—under what conditions is it necessary or important?

A. Well, where there is a marked destruction of the clavicle, an operation would be indicated—or considerable overlapping.

Q. Would that operation become more dangerous

(Testimony of Frank M. Boyle.)

and less likely to be successful after a great lapse of time from the original accident?

A. Why, the longer the time that elapsed, the results in my opinion would be less likely to be good.

Q. Assuming in this case that there was not a correct setting of the bone, would it have been a good idea to have such an operation performed about February or March—that is, would it have been more likely to be successful at that time?

A. Well, if an operation were indicated, the sooner it was done the better.

Q. Is that true of any abnormal condition, as it gets older an operation is less likely to do it any good? A. Usually.

Q. Now, Doctor, on this question of the length of the clavicle, of the comparative size and strength, etc., of the clavicle—is there any standard authority as to ordinary conditions in ordinary individuals?

A. Yes, there are various works on anatomy.

Mr. RITCHIE.—This is Gray's Anatomy. I will ask the witness to [118] read from page 171 a statement in regard to clavicles.

The WITNESS.—This is an article on clavicles. It says—Peculiarities of the bone in the sexes and in individuals. I suppose you have reference to this part marked here that you want read?

Mr. RITCHIE.—Yes.

The WITNESS.—It says—The right clavicle is generally longer, thicker and rougher than the left.

Mr. RITCHIE.—Read the whole paragraph.

The WITNESS.—(Reading:) In the female the

(Testimony of Frank M. Boyle.)

clavicle is generally shorter, thinner, less curved, and smoother than in the male; in the female it is placed almost, if not quite, horizontal, while in the male it inclines slightly downward and inward. In those persons who perform considerable manual labor, which brings into constant action the muscles connected with this bone, it becomes thicker and more curved, its ridges for muscle attachment become prominently marked. The right clavicle is generally longer, thicker and rougher than the left.

Q. Is it your view that that is a correct statement, Doctor? A. Yes.

Q. Are you able to say, and if you are able to say, state, what, in your opinion is the degree of impairment of the plaintiff's strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. DONOHOE.—To which question we object as incompetent, irrelevant and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

Mr. RITCHIE.—It applies wholly to the second cause of action. The second cause of action is based upon the claim that the earning [119] power of the plaintiff has been impaired permanently.

By the COURT.—The objection will be overruled. The testimony of the witness will be received by the jury as applicable to the second cause of action.

Defendant allowed an exception to the ruling.

(Testimony of Frank M. Boyle.)

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation, as a laboring man.

Q. Well, is he wholly disqualified at this time; that is, is he utterly unable to perform his usual work, his usual vocation?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. If his vocation is that of a miner, I would say yes—requiring the use of both of his arms.

Q. Are you of the opinion that he will be totally disqualified to follow that vocation for the rest of his life or will he partially recover? It is only an opinion, of course—nobody can say positively?

A. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be.

Q. Do you think he will ever entirely recover his normal strength and flexibility in the use of that shoulder?

A. I am inclined to question whether he will.
(By Mr. DONOHOE.)

Q. What do you base your statement on that you are in doubt whether he ever will really recover the use of that right arm? [120]

A. I base my opinion upon an observation of the man and studying him.

Q. What particular defect do you find in his shoul-

(Testimony of Frank M. Boyle.)

der or in the region of his right clavicle or shoulder, which would cause him permanent disability?

A. The man to-day as far as I can determine is in no better shape than he was when I examined him last July, as far as the use of that right arm is concerned.

Q. State what physical disarrangement you find that would cause him permanent disability of his right arm?

A. The shortening of the clavicle three-eighths to a quarter of an inch and overlapping, the bone of the clavicle.

Q. That is the only thing you base your opinion on? A. That is what I base my opinion on.

Q. And in the region of that clavicle, in exploring it, you discovered no tenderness or soreness—the plaintiff experienced no tenderness in that region?

A. In exploring the clavicle anteriorly and above, I can detect no tenderness—as to whether or not there is tenderness underneath the clavicle, it is impossible for me to manipulate there and determine that fact.

Q. Are you willing to state at this time that that right clavicle is not in alignment, in natural alignment? A. I am, positively.

Q. What is the difference? What is the condition that makes it not in natural alignment?

A. There is an overlapping of the clavicle.

Q. Does the X-ray show any indications that there is not a natural alignment?

A. The X-ray pictures as taken do not. If it

(Testimony of Frank M. Boyle.)

were possible to take [121] an X-ray picture from above, downward, very likely it would show this abnormal condition; by that I mean, if it were possible to get a plate underneath here—it is not, but if the rays were transmitted from above and the plate were here, it would show this abnormality, but a picture taken posteriorly, from front to back or back to front, does not do that. Ordinarily the picture would show a thickening there at the seat of the fracture but these pictures that have been taken do not show any perceptible thickening there, but that thickening is there, quite apparent, when we manipulate the parts.

Q. Is it not a fact that that particular portion of the clavicle, in a natural clavicle, if there is no bone fractured, there is a natural prominence there of the bone which makes it thicker there at that point or apparently thicker to the touch?

A. You have the man's left clavicle there in comparison with the right clavicle—at the shoulder in both clavicles there is a thickening, a considerable enlargement.

Q. Couldn't a portion of this enlargement which you say is there be due, not to overlapping, but to the fact that the bone is naturally thicker at that point—there is a prominence at that point?

A. That condition there is not natural in my opinion.

Q. No part of it natural?

A. At the seat of the fracture it is not a natural condition.

(Testimony of Frank M. Boyle.)

Q. There is no prominence at that particular point of the clavicle that has not been fractured?

A. Nothing like to the extent that there is noticeable in this man.

Q. How much of that thickening that you speak of would be due to the natural prominence there and how much to the result of the fracture?

A. Well, the condition of the bone there and that overlapping is practically all the result—and that thickening there—is [122] practically all the result of that malposition.

Q. I believe you have testified that you know of cases where there was overlapping notwithstanding the fact that the patient had been properly bandaged shortly after the accident—you have stated that, have you? A. Yes.

Q. Then if this clavicle, this overlapping a little—if this clavicle does overlap a little it is not an unusual condition of the clavicle, is it?

A. It is a most unusual condition where a case has been under the continued observation of a physician or surgeon; it is only such cases as are not under the continued observation of a physician and surgeon that go wrong.

Q. I believe you testified that there were some cases that you had in which there was an overlapping and you said that it was not due to your fault but to some other agency?

A. Well, cases would get out of my hands and probably go away and would not be under the care of a physician.

(Testimony of Frank M. Boyle.)

Q. Now, in this case was the patient unable to raise his arm up on the side where the clavicle was fractured?

A. These cases I have had I lost entire track of them—that I had in mind—I never saw them again and couldn't state.

Q. Can you at this time state a specific case where the clavicle was broken and in the union there was an overlapping that caused the patient to lose the use of his arm?

A. I cannot recall a case of mine of that kind, no.

Q. Nothing of that kind has come under your observation? A. No.

Q. Although you have seen people where the right clavicle was overlapping, have you not, in the union from a fracture? A. Yes, I have. [123]

Q. Were those people able to raise their arm up in a perpendicular position?

A. I couldn't state as to that.

Q. Then in your experience as a physician and surgeon, you have never had a case called to your attention until this one, in which the patient's clavicle had overlapped, that caused the patient to lose the ordinary use of his arm?

A. This is the first case that I have seen of this particular character.

Q. And you have observed those conditions frequently in your practice, have you not?

A. I wouldn't say frequently—I have seen probably a couple of dozen cases of fractured clavicle during my career, perhaps a dozen which I was in

(Testimony of Frank M. Boyle.)

attendance upon personally.

(By Mr. RITCHIE.)

Q. Have you ever seen a particular case where the overlapping was as extensive as in this case?

Mr. DONOHOE.—We object to that as not re-direct examination.

Objection overruled; defendant allowed an exception.

A. I have seen cases with as much overlapping as this, yes, sir.

Q. Have you ever seen one where the clavicle was shortened as much as this? A. Yes.

(By the COURT.)

Q. The statement you read from Gray's Anatomy, was that directed to a person who was known as right-handed or left-handed?

A. Why, it would apply to right-handed people.

Q. And is this plaintiff from your observation right-handed or left-handed? [124]

A. He is right-handed.

(By Mr. DONOHOE.)

Q. Did you ever see a case of a fractured clavicle in which there was an overlapping of the bone in the union that did not shorten the clavicle more than three-eighths of an inch?

A. I have seen cases of overlapping where there would not be a shortening of over one-eighth of an inch—it depends of course upon the extent of the overlapping; the shortening is of course in direct proportion to the extent of the overlapping.

(Testimony of Frank M. Boyle.)

Q. How much do you determine the overlapping to be in this case?

A. The overlapping in this case is from three-eighths to five-eighths of an inch.

Q. How do you determine that?

A. By measurements.

Q. Are you able to ascertain the end of the inside part—

A. The sternal end of the clavicle?

Q. No. I understand you to say the overlapping is in this position (indicating). Now the inside—

A. I am basing my opinion of the overlapping upon the amount of shortening. Of course I can confirm that to some extent by manipulating the clavicle at the seat of the fracture.

Witness excused.

Testimony of Tony Possus, for Plaintiff (Recalled).

TONY POSSUS, the plaintiff, recalled.

(By Mr. RITCHIE.)

Q. Are you right or left-handed?

A. Right-handed.

Witness excused. [125]

Testimony of Charles A. Winans, for Plaintiff.

CHARLES A. WINANS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. What is your name? A. Charles A. Winans.

Q. Where do you reside? A. Valdez.

Q. How long have you lived in Valdez?

A. Eighteen years about.

Q. What is your occupation or profession?

(Testimony of Charles A. Winans.)

A. Physician and surgeon.

Q. Are you a graduate physician of some medical institution? A. I am.

Q. What college?

A. Bellevue Hospital Medical School, New York City, Bellevue Hospital Medical College.

Q. When did you graduate from Bellevue?

A. March 8, 1888.

Q. Have you been practicing your profession ever since? A. Pretty steadily.

Q. Where did you practice before coming to Alaska? A. In Benton Harbor, Michigan.

Q. And you have been practicing in Valdez most of the time since you came to Alaska? A. I have.

Q. You know the plaintiff in this action, Tony Possus? A. I do.

Q. Where did you first meet him? And when?

A. I met him, I think, it was last spring, the spring of 1916, here in Valdez. [126]

Q. About what time, as near as you can fix it?

A. I don't know; it might have been February; it might have been April—I don't know the correct time.

Q. I will ask you if you know when he went to Cordova to have an X-ray taken by Doctor Chase?

A. I don't remember the time.

Q. You didn't know about that? A. No.

Q. Did you make any examination of him at the time you first met him? A. I did.

Q. State what condition you found and if there

(Testimony of Charles A. Winans.)

was anything out of the ordinary in any part of his body.

A. I found his physical condition apparently about as it is now.

Q. Did you find anything wrong with his bone, his clavicle?

A. I found a fractured clavicle, the right clavicle.

Q. Did you make an extensive examination at that time? A. Well, as much as was possible, yes.

Q. What was the condition of his shoulder, was it perfectly normal outside of the fractured bone?

A. I don't remember what condition I found in his shoulder.

Q. I mean was it normal as to size—was there any swelling or anything of that kind, do you remember?

A. I can't remember that.

Q. Did you do anything for him at that time?

A. I did.

Q. What did you do?

A. Well, I tried to replace the bone and I found it was more or less affected at the break and the muscles were more or less rigid about the shoulder joint and I put on adhesive plasters trying to extend the distal end of the clavicle, that is, to pull the [127] bone out, one plaster around the upper arm and carried it around the body and fastened it, and the other plaster around the elbow and fastened it, this way (indicating), brought the arm up against the chest wall,—that was to extend the clavicle, pull the bones apart, but he was under that treatment for three or four days and I saw it didn't relieve his

(Testimony of Charles A. Winans.)

pain and I thought seemed to give him more pain and I abandoned the treatment, because I considered it more or less a harmless experiment, putting the dressings on there.

Q. Now, will you just describe to the jury briefly the nature and extent of that fracture?

A. Well, the fracture is about the outer third of the clavicle and the inner fragment, or the fragment next to the breast bone or the fragment that is attached to the breast bone lies forward of the outer fragment. The proximal end of the clavicle is forward and the distal end is behind,—the two fragments lie in that position, one behind the other. (Indicating.)

Q. Was that the condition at that time?

A. Well, as near as I can remember it was, yes.

Q. Now, to what extent, that is, to what length did one portion of the bone protrude beyond the other? A. I don't remember that.

Q. You remember there was a protrusion but don't remember the extent?

A. All I remember was that there was a break there,—I don't know exactly what the condition was, I have forgotten.

Q. Could you feel the break with your fingers?

A. There was a complete offset there—there was quite a prominence at that time, I remember that.

Q. Could you distinctly feel that condition with your finger? A. I could, yes.

Q. Now, did you ever examine the plaintiff after you took the bandages [128] off of him?

(Testimony of Charles A. Winans.)

A. Yes, I did.

Q. When? A. The day I took it off.

Q. Did you examine him any time afterwards?

A. I examined him nine or ten months afterwards, —that is the other day.

Q. In the meantime, after the examination you made, when you took off the bandages, you had nothing to do with his case, until all you doctors had him at Doctor Boyle's office the other day?

A. That is correct.

Q. What condition did you find the other day, this week?

A. I found apparently about the same condition; the arm is not as rigid as it was when I first saw him, it is a little bit freer, he moves it freer.

Q. Had the bone grown together since last winter, since you examined it last winter?

Mr. DONOHOE.—When? Fix the time.

Q. Since you made the examination in the early part of 1916?

A. I don't remember how firm the union was last spring, but it seems to be very firm now.

Q. There has been a union since then or a partial union?

Mr. DONOHOE.—We object to that question—the witness has not testified that there was a separation at the time he made the first examination.

Objection sustained.

Q. Was there any separation there, Doctor?

A. Well, there had been; there was a complete offset of the bone, one fragment was forward of the other.

(Testimony of Charles A. Winans.)

Q. I mean at the time you examined him in the early part of 1916, was there any separation? [129]

A. What I mean to say is, the bone had been broken—I don't know whether it was done six months before or three months or one.

Q. I am talking about the existing condition—at the time you first examined him,—was there a noticeable separation at that time?

A. I can't remember that,—all I know is I didn't reduce it at that time.

Q. Since that time, though, between the examinations you made in the early part of 1916 and the examination you made last spring, there had been a growing together, a union of the bone?

A. It might have been united to some extent at that time, at first, but it seems to be very firm at present.

Q. At the time you made the examination in the early part of 1916, the first examination, can you state whether the fracture was apparently of recent occurrence?

A. I judged that it was from the way he handled it, that is all.

Q. Now, the other day, when you took this X-ray picture in Doctor Boyle's office, did you measure the clavicle or assist in measuring it? A. I did, yes.

Q. What is the relative length of the right and left clavicle, is one shorter than the other?

A. The right one is shorter than the left.

Q. How much shorter?

(Testimony of Charles A. Winans.)

A. Something over a quarter of an inch,—from a quarter to a half.

Q. Have you measured it again, since, yourself?

A. I have once, since, yes.

Q. That was last night, was it?

A. That was last night.

Q. What did you find the difference in length at that time? A. I think it was five-eighths. [130]

Q. Now, Doctor, is it your opinion that the man's shoulder now is normal as to strength and flexibility?

A. I don't think that he has the same strength.

Q. What is necessary to restore the strength, if anything, or would it be possible to restore it?

A. It might be possible and it might not—that question is hard to answer; it is hard to say.

Q. Do you think that an operation now would do it any good?

A. That is questionable, whether an operation will.

Q. If an operation had been performed shortly after you first examined it, do you think it would have corrected the malformation and restored the strength there?

A. That is a little hard to say.

Q. Do you think that this clavicle was properly set after the injury? A. I don't know.

Q. What is your opinion, from the indications?

A. I couldn't tell anything about it,—I don't know what was done to it.

Q. All you know is the condition you found it in?

A. All I know is the condition I found it in.

Q. Is it your opinion that the man is in any way

(Testimony of Charles A. Winans.)

permanently injured?

A. Well, that is a little hard to answer—he might have a fairly useful member there. At present the motion of that extremity I think is limited from this fact, that he has guarded that arm for about a year and any part of the body that is not in use will become more or less atrophied, the ligaments will become shorter, more firm and the muscles more firm and bound down. Now, whether he will overcome that in time I can't say. There is a little more motion there than there was last spring; when I [131] examined him last spring, he guarded that arm pretty thoroughly but now there is more motion there.

Q. Did he apparently suffer pain last spring or whenever it was you first examined him—did he apparently suffer much pain there?

A. Apparently he suffered more pain then than now.

Q. Does he still suffer pain?

A. I think he suffers some, I don't know how much.

Q. Do you think he is able to raise his right arm high?

A. I haven't seen him do it,—I can hardly say as to that.

Q. Did you see him try to do it? A. Yes, sir.

Q. Do you think he raised it as high as he could without assistance?

A. I rather think he did. Possibly under excitement he might throw that arm up—it would cause

(Testimony of Charles A. Winans.)

him pain, I think; it hurts him when he does it.

Q. Would he naturally stop raising it after it caused him pain? A. Yes, sir.

Q. You are not able to express any opinion then as to the probability or improbability of his being permanently injured to any degree?

A. No, that is hard to say. I don't think the motion there will be as free as it was, around the shoulder joint, because he has guarded it so long; but it may be a fairly useful member.

Q. Is he more likely to recover the strength of the shoulder than the flexibility?

A. Yes, I think so.

Q. Do you think he can use that shoulder as well as he formerly could in the occupation of a miner, if that was his occupation?

A. I cannot tell you that for this reason I do not know how much that shoulder joint will recover its mobility.

Q. Do you think he will recover the strength and flexibility of [132] his shoulder so nearly that he can use it pretty well in overhead movements?

A. I have an idea they might be; yes, sir.

Mr. RITCHIE.—That's all.

Cross-examination by Mr. DONOHUE.

Q. When this plaintiff called upon you last year, was there a union of the clavicle at that time, the right clavicle? A. That is a bony union?

Q. Yes. A. I couldn't say as to that.

Q. You would not at this time say that the bones had not united previous to his calling at your office?

(Testimony of Charles A. Winans.)

A. No, I would not.

Q. And in your examination the other day, two days ago, with the other doctors—you know positively that there is a union there now?

A. It seems to be very firm.

Q. Didn't it appear to be fairly firm when you first examined him last spring?

A. It seemed to be firm enough so I couldn't reduce it.

Q. And in manipulating it, you could not get any results that led you to believe it had not united?

A. I can't remember the condition—that is nine months ago.

Q. You will not say, however, that it was not united at that time? A. No.

Q. Now, in case a patient came to you with a fractured clavicle at the point where this clavicle shows fracture, what kind of treatment would you give him? A. With a fractured clavicle? [133]

Q. Yes, a fracture similar to this one, in the first place?

A. I would try first to reduce it and if I could not do that, I would put on an adhesive strip—I have explained to you about an adhesive plaster—around the upper part of the arm, just below the shoulder joint and draw the shoulder and arm directly backward and fasten the adhesive plaster around the body, and that puts an extension on the clavicle and tends to draw the bones apart, and then I would draw the hand directly over the chest this way (indicating), and put an adhesive plaster around the point of

(Testimony of Charles A. Winans.)

the elbow and up over the opposite shoulder.

Q. Now, in the case of that kind of a fracture, if the patient had come to you in the first place you would not have recommended an operation or a cutting away of the bone, would you? A. No.

Q. There was no occasion for performing an operation, was there, or there was no occasion for wiring the bone together or anything of that sort?

A. That is always up to the patient, what they want done.

Q. Isn't it up to the doctor to tell the patient what should be done? A. Yes.

Q. In a case of that kind, in a similar case to the case of plaintiff, would you have recommended an operation at that time or not?

A. Well, I did to him, when he came to me.

Q. I am speaking in the first instance.

A. When they are first broken?

Q. Yes. A. No, I would not.

Q. What kind of an operation would you perform—just describe what you would have done if the patient had accepted your advice and [134] submitted himself to you for an operation.

A. If I had operated I would have made an incision directly over the bone and have separated that bone and if there was a ligamentous union, I would have divided whatever connecting tissue was there, put on an extension and freshened the end of the bone and *wiring* them together.

Q. You feel they needed a wiring together at that time? That the bones should have been broken

(Testimony of Charles A. Winans.)

apart, the ends freshened and wired together?

A. I think at that time that was the only way to bring the ends in apposition.

Q. Do you think the condition would warrant a skilled physician to recommend an operation such as you have described, at that time?

A. I recommended that because he claimed to be suffering so much pain.

Q. You didn't recommend massage treatment or anything of that sort with liniment and hot applications? A. No.

Q. Did you ever perform an operation for the purpose of uniting a clavicle?

A. No, never saw a case.

Q. You never saw one performed? A. No.

Q. Did you ever read of one being performed?

A. No,—I presume they are performed in bad cases, but I can't call any to mind now.

Q. You know in your practice of many cases where persons have had fractured clavicles and in the union they have overlapped slightly, do you not?

A. I have not had many fractures of clavicles although it is a very common fracture. [135]

Q. Have you ever observed a person who had sustained a fracture of his clavicle in which his arm was disabled to the extent that this plaintiff claims his is?

A. I can't recall any case.

Q. Now, you say, I believe, that you measured the right and left clavicle of this plaintiff last night?

A. Yes, sir.

Q. And you found the right clavicle five-eighths of

(Testimony of Charles A. Winans.)

an inch shorter? A. Yes, sir.

Q. Now, is it possible with a man of such heavy muscular development about his shoulders as this man has for you to determine with absolute accuracy the length of each of his clavicles?

A. I think so, yes.

Q. You were present, were you not, in Doctor Boyle's office the day before yesterday when yourself and other doctors examined this man?

A. Yes, sir.

Q. You were present when his clavicle was measured at that time? A. Yes, sir.

Q. Is it not a fact that you agreed with Doctor Gross at that time that the difference in length was about a quarter of an inch?

A. I think that is what we made it.

Q. Now, if it is possible to accurately determine the length of these bones, how do you account for the one-quarter of an inch in one measurement and the five-eighths of an inch in the other measurement?

A. These points, they are not as exact as the end of a yardstick; all bones are more or less rounding, wherever there is a joint and there may be a little discrepancy in the measurements at any time, and not another. For instance, I might hold the tapeline I will say at so much and the next man will come along and [136] measure it and I may get one-eighth of an inch more or a quarter or whatever it is—he may vary in his points of measurement.

Q. Now, which of these measurements would you say was correct, a quarter of an inch obtained when

(Testimony of Charles A. Winans.)

four doctors were present or the five-eighths when you measured him alone—there is three-eighths of an inch difference in the measurements?

A. I think Doctor Gross measured it. Did you use the tape-line, Doctor Gross?

Doctor GROSS.—Yes, and apparently it was a quarter of an inch—I think there was something over that a little bit.

Q. And did you make this examination last night by yourself?

A. Yes—there were others present.

Q. No other doctors present?

A. Doctor Boyle, I think, was present.

Q. Did you examine the X-ray picture taken by Doctor Chase along about the 20th of March, last year, 1916, of this man's shoulder?

A. I examined the plate that was said to be taken by Doctor Chase.

Q. From that plate, did you discover any overlapping of the clavicle? A. I could not.

Q. You read the statement that Doctor Chase wrote Mr. Ritchie regarding what he discovered to be the man's condition from his inspection?

A. I do not now remember that I did.

Q. Do you recall now that the doctor said there was a dislocation instead of a fracture?

A. I didn't hear,—I don't think I heard it at all—I don't remember it.

Q. Now, you are quite certain that there was no separation of the bone when this patient called upon you last spring? A. What is the question?

(Testimony of Charles A. Winans.)

Q. You are positive at this time there was no separation of the [137] plaintiff's right clavicle at the seat of fracture when he called upon you last spring? A. I know that it had been broken.

Q. But at that time there was no separation?

A. I can't tell.

Q. You couldn't tell? A. No.

Q. You didn't get any results that would lead you to believe there was a separation, did you?

A. No.

Q. Now, if this plaintiff was able to extend his right hand to his left shoulder, with his arm across his breast, could there have been any separation of the clavicle?

A. That is a little hard to say—would there have been a separation if he had put his hand—

Q. His right hand on his left shoulder, in this position (indicating)?

A. It would be very difficult for him to do.

Q. Isn't that one of the standard tests to determine a fracture of the clavicle?

A. I can't say as to that.

Q. Did you discover in your examination of the defendant the day before yesterday—of the plaintiff, I mean—did you discover any tenderness or soreness in the region of his right clavicle?

A. No.

Q. Can you at this time state any reason from your physical examination of the plaintiff, including an X-ray examination, why he should not now enjoy

(Testimony of Charles A. Winans.)

the full strength and ordinary use of his right arm and shoulder?

A. That is a little hard to say.

Q. Do you discover any disarrangement? [138]

A. No, I cannot.

Whereupon court took a recess to 2 P. M.

AFTERNOON SESSION.

Mr. DONOHOE.—I have no further cross-examination at this time.

Redirect.

(By Mr. RITCHIE.)

Q. In answer to some questions by Mr. Donohoe you stated that the correct way to bandage the arm and shoulder in order to have the bone grow together properly was first to hold the elbow up high in the way that you indicated. If that were not done and the arm hung loosely down, what effect, if any, would it have upon a fractured clavicle?

A. The muscles tend to rotate the bone out of position—the tendency is for the fragments to rotate out of position.

Q. So they would not grow together properly?

A. Yes, sir.

Q. The object of the body bandage is to hold the ends of the bone closely together so they will knit?

A. Yes, sir.

Q. There has been considerable inquiry here about a possible operation to correct this supposed malformation in the bone fracture. Will you explain under what circumstances such an operation

(Testimony of Charles A. Winans.)

is performed, that is, what the object of it is?

A. In case a man is suffering too much pain from pressure of the fragment, it might be advisable to cut the bone in two or break it again, and freshen the ends and wire them together—that is, considering it is paining him at that point.

Q. What do you mean by freshen the ends?

A. Either scraping or sawing them off, so there would be a fresh bone surface exposed. [139]

Q. Do the ends of a fractured bone get calloused over? A. They do sometimes.

Q. And in case of an operation, it would be necessary to freshen them, so they would grow together; is that the idea? A. That is the idea.

(By Mr. DONOHOE.)

Q. Assuming that the patient had a fractured clavicle and had his arm bound up in this position (indicating) instead of hanging loose, it would then have a tendency to be in a proper position for the perfect knitting of the bone?

A. It might not be in the proper position, but it would knit quicker if the arm were quiet.

Q. How long does it ordinarily require for a fractured clavicle to knit?

A. That varies with every case,—probably anywhere from three weeks to six weeks. It depends on the conditions.

Q. It may knit in three weeks?

A. I think so.

Q. Now, you say it is advisable to perform an operation in case the patient is suffering too much

(Testimony of Charles A. Winans.)

pain. What do you mean by too much pain?

A. Well, if the fragments were out of alignment badly, they might press on the nerves underneath—the fragment press on any nerve.

Q. Would you say the fragments in the plaintiff's right clavicle are out of alignment to such an extent?

A. I wouldn't say positively that they are, but it is possible they might be.

Q. You wouldn't say positively they are, but possible they might be? A. Yes.

Q. It might be possible that that condition would exist at any [140] time in the union of a fractured clavicle? A. I think so.

Q. Have you seen anything in your examination of the plaintiff's clavicle from which you would be willing to stake your professional reputation that the fragments of this bone are pressing upon the nerves to such an extent as to require an operation?

A. No, sir; I would not say that.

Witness excused.

Mr. RITCHIE.—I will now introduce the statement of Doctor Chase to be admitted as his deposition under stipulation and at the conclusion of the reading, I will offer this as an exhibit—this X-ray picture.

Mr. DONOHUE.—No objection.

The COURT.—You may read the statement.

Mr. Ritchie reads the statement as follows:
(Title of Court and Cause.)

Stipulation as to Testimony of W. H. Chase.

It is hereby stipulated by and between the parties to this action that the following be admitted as the testimony of Dr. W. H. Chase of Cordova, Alaska, in behalf of plaintiff at the trial of this cause, subject to objection for relevancy, materiality and competency under the issues of the cause, to wit:

That said W. H. Chase is a graduate physician in regular practice at Cordova, where he has been in practice for at least eight years; that he was a practicing physician elsewhere prior to coming to Cordova. That he is a licensed physician under the laws of Alaska and was during all the year 1916.
[141]

That on or about March 20, 1916, at Cordova, he took an X-ray photograph of plaintiff's right shoulder, which he dated in his own handwriting and which is offered by plaintiff and admitted by defendant to be the photograph in question. Further, that in his opinion plaintiff's right clavicle was at that time dislocated at its outer articulation and the end of the bone was protruding upward.

Signed by the respective attorneys.

The COURT.—The statement just read will be received by the jury as evidence in the case.

The X-ray referred to in the statement of Doctor Chase is received in evidence, marked Plaintiff's Exhibit "B," and made a part hereof.

Mr. RITCHIE.—We will now call Mr. Attrick.
[142]

Testimony of Dan Attrick, for Plaintiff.

DAN ATTRICK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Dan Attrick.

Q. Where do you live? A. In Valdez.

Q. How long have you lived in Valdez?

A. Probably a month.

Q. Where were you living in January and February, 1916? A. In Allamar.

Q. What were you doing there?

A. Working in the mine.

Q. You are a miner—is that your occupation?

A. Yes.

Q. You were working for the Ellamar Mining Company? A. Yes, sir.

Q. What country are you a native of?

A. Russia.

Q. How long have you lived in the United States?

A. From 1909.

Q. Do you know Tony Possus?

A. Yes, sir; I know him in Ellamar.

Q. How long have you known him?

A. Since 1915.

Q. Do you remember the time when he met with an accident in the mine there, about a year ago?

A. Yes, sir.

Q. Were you working in the mine at the time?

(Testimony of Dan Attrick.)

A. Yes, I worked on the day shift and he on the night shift.

Q. You were not on the night shift? You were not in the mine at [143] the time he was hurt?

A. No.

Q. Did you see him soon after the accident?

A. Yes, sir.

Q. What time after?

A. The next day—four o'clock in the afternoon.

Q. Four o'clock in the afternoon of the day following the night on which he was hurt?

A. Yes, sir.

Q. Where was he at that time?

A. He was lying down in the bed in the hospital.

Q. Was there any other person present when you were there besides himself?

A. Another man and Mrs. Tramontin.

Q. What was Tony doing?

A. He was on the bed.

Q. Was he bandaged up in any way?

A. I forget—he has something on the shoulder; yes, he has a bandage.

Q. Did you see him after that on any other days?

A. Yes, I see him the next day.

Q. Was he still in bed?

A. Yes, he sat down in the bed.

Q. Did you see whether or not he was bandaged at that time? A. I think— Yes.

Q. (By the COURT.) You say "I think."

Q. Do you think he was or think he was not?

A. He has got a bandage on the shoulders.

(Testimony of Dan Attrick.)

Q. You understand what a bandage is—stripes of cloth?

A. Yes, sir, across the shoulders—from the right shoulder to the left.

Q. How much of his body could you see—how far down? [144]

A. I can't see no further than I see the shoulder.

Q. Did you see him nearly every day while he was in the hospital?

A. Yes, I make a visit every day.

Q. Did you see him at any time when he had no bandage on?

A. I guess after five days—I never see a bandage after five or six days.

Q. The first five or six days you think he had a bandage on and after that, he did not?

A. Yes, he had for the first five days.

Q. Do you know when Tony left the hospital—how long it was after his accident?

A. It was probably the 26th or 25th of January.

Q. Did you see him after he left the hospital anywhere?

A. Yes, he was in the bunk-house—I see him pretty near every day, too.

Q. You saw him pretty near every day?

A. Yes.

Q. Do you know how he got his meals at that time?

A. A friend, he bring him his meal from the boarding-house.

Q. When you saw him the first days in the hos-

(Testimony of Dan Attrick.)

pital was Mrs. Tramontin there several times, or more than once?

A. Yes, Mrs. Tramontin make a visit, I guess, eleven o'clock in the morning; sometimes four o'clock in the afternoon.

Q. Did you ever have a talk with her about how Tony was hurt? A. No; she says it is too bad.

Q. Were you ever present in the company office or store when there was—I will change that. Did you ever hear in the company office or store any conversation between Tony Possus and either Mr. Gedney or Mr. Estey? A. Yes.

Q. Just state when that was. [145]

Mr. DONOHOE.—We object to this on the ground that it is incompetent, irrelevant and immaterial testimony.

Objection overruled; defendant allowed an exception.

Q. About how long after Tony left the hospital was that, if you remember? Fix the date if you can. How long after he was hurt was it, as near as you can tell? A. I can't tell exactly.

Q. Was it some time after he left the hospital?

A. I don't know.

Q. Who was present at this conversation that you spoke of? A. Mr. Estey.

Q. Who else?

A. Mr. Estey, and after awhile Mr. Gedney.

Q. And you and Tony were there?

A. Yes, me and Tony and another two men.

(Testimony of Dan Attrick.)

Q. What did they say, if anything, to Tony, and what did Tony say to them?

A. To Mr. Estey?

Q. Yes. Was this in the store?

A. No, in the hospital.

Q. This first conversation you spoke about, was this in the hospital? A. Yes, sir.

Q. Tell what happened there.

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint that was stricken out on our motion in the first complaint and goes to the question of signing a release to the company.

Objection overruled; defendant allowed an exception.

Q. State what conversation took place there.

[146]

The COURT.—Who was present first and when was it? A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody's fault—it is Tony's fault himself. He said I never sign this paper because it is not my fault and Mr. Estey told him, if you not sign this paper, the company charge you for board

(Testimony of Dan Attrick.)

while you were in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the store or office of the company hear any conversation between Tony and either Mr. Gedney or Mr. Estey?

A. No, I did not.

Q. Was that the only time you heard any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey go and he talk to Mr. Gedney.

Mr. DONOHOE.—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time, as shown by the plaintiff's own testimony.

The COURT.—The last part of that answer, regarding Mr. Gedney, may be stricken.

Q. You didn't hear any conversation in the store there or office of the company? A. No.

Cross-examination.

(By Mr. DONOHOE.)

Q. How do you know that those bandages were removed after five days?

A. I don't see any after five days—I don't know who moved them.

Q. You don't know whether he had bandages on after that or not? [147]

A. I never see any after five days.

Q. After five days do you know positively that he had no bandages on him?

A. Yes, I know after five days.

Q. How do you know?

(Testimony of Dan Attrick.)

A. Because I make a visit every day.

Q. Did he have his shirt off?

A. He don't have a shirt on his shoulder; just a coat.

Q. He had no shirt on at all? A. No.

Q. No undershirt? A. No.

Q. Just naked there, with a coat on?

A. Yes, just naked with a coat on.

Q. Was his right arm in a sling?

A. He had a shirt on just one shoulder—he had a shirt on one shoulder.

Q. Is it not a fact that his right arm was in a sling and a coat was thrown over the shoulder and his right arm was held up in this position (indicating)? Is it not a fact that his right arm was held up in that position, with his right hand toward his left shoulder and his arm across his breast?

A. No, I think he had a black coat on one side—it looked like a coat.

Q. How was he carrying his right arm? What position was his right arm in?

A. I don't see his right arm—he have a bandage on.

Q. He had a bandage on the right arm?

A. Yes, after five days he had black on the shoulders.

Q. When you were there five days after he had a bandage on the right arm?

A. I don't understand. [148]

Q. You understood Mr. Ritchie when he was questioning you about bandages—do you know what a

(Testimony of Dan Attrick.)

bandage it? A. No, I don't know.

Q. Then you don't know whether he had a bandage on or not, do you—if you don't know what it is? Can you answer that question? (No answer.)

Q. How do you know it was five days after the accident?

A. He has been in the hospital and I bring to him sometimes cigarettes and sometimes roll cigarettes.

Q. How do you know it was not twenty days after?

A. After twenty days he has been in the bunk-house. I went to his room every day and fixed up his bed and he asked somebody to bring his meals because there was no one to bring his meals in.

Q. Couldn't he walk all right?

A. He can't because his right shoulder—

Q. Because his right shoulder was sore, he couldn't walk? A. He can walk; yes.

Q. Why didn't he go to the mess-house and get his own meals?

A. After twenty days he goes to the cook-house himself and eat.

Q. Why couldn't he go when he left the hospital?

A. In the hospital he gets his meals every day.

Q. When he left the hospital he walked to the bunk-house, didn't he? A. Yes.

Q. And the bunk-house was further from the hospital than the mess-house is from the bunk-house, isn't it—he had to walk further? A. How far?

Q. From the hospital to the bunk-house.

The COURT.—Ask him which is nearer.

Q. Which is nearer to the mess-house, the bunk-

(Testimony of Dan Attrick.)

house or the hospital?

A. From the mess-house to the hospital probably six or seven hundred feet, maybe a thousand feet.

[149]

Q. And from the bunk-house to the mess-house how far?

A. Maybe three hundred feet, maybe two hundred feet.

Q. About 200 ft. from the bunk-house to the mess-house? A. Yes, sir.

Q. Why didn't Tony walk over to the mess-house and get his own meals?

Mr. RITCHIE.—We object to that on the ground that this witness is not supposed to know why he didn't do it.

The COURT.—He may answer if he knows.

Q. You are a countryman of Tony's—you and Tony come from the same country? A. Yes, sir.

Q. Did you know him in Russia?

A. Not yet—Russia a big country.

(By Mr. RITCHIE.)

Q. You stated you did not know what a bandage is. Tell us what Tony did have on his body after four or five days, if anything?

A. Sometimes he have a bandage and sometimes not—I can't tell.

Q. The first time you saw him, did he have white strips of cloth on him?

A. Yes, the first time he had a bandage.

Q. You understand that is what is meant by a bandage?

(Testimony of Dan Attrick.)

A. He had no clothes at all the first day, he had no shirt.

Q. He had them on when you first saw him, the first day or two? A. Yes.

Q. And after four or five days he didn't have them, is that the idea?

A. If I remember right—he first has and afterwards did not.

Q. The first day or two he had the strips on?

A. Yes, sir, and the second and third. [150]

Q. And the second and third—and then afterwards you didn't see them any more—is that the idea?

A. I can't tell, after 5 maybe after ten days—I can't tell because it is a long time.

Q. Before he left the hospital they were taken off, were they? A. I think so.

(By Mr. DONOHOE.)

Q. When did Tony leave Ellamar?

A. I don't know.

Q. Do you remember the Doctor coming down from the Post from Fort Liscum, down to Ellamar?

A. I remember them talking, I don't know what day of the month he has been there.

Q. Do you remember the doctor coming down?

A. I don't remember the day of the month.

Q. You remember he did come down there, some time in February? A. No.

Q. You never saw the doctor from the Post down there, from Fort Liscum, Doctor Duckwall?

A. I see him there, yes, the doctor—I don't know what time he has been there.

(Testimony of Dan Attrick.)

Q. Was Tony staying in the bunk-house when that doctor came down? A. Yes.

Q. Was Tony in the bunk-house at the time that Mr. Gedney got his leg broke? A. Yes, sir.

Q. He was in the bunk-house then?

A. Yes, sir.

Q. How long had he been in the bunk-house?

A. Twelve or thirteen days? [151]

Q. Twelve or thirteen days previous to that?

A. Yes, sir.

Q. What is it that fixes it on your mind as twelve or thirteen days—what makes you remember that?

A. Because the 12th of January he got hurt,—I remember that and he wasn't over 28 days in Ellamar; after 28 days he got discharged.

Q. Then he was at the hospital for twenty-eight days?

A. In the hospital fourteen and the bunk-house thirteen—like that.

Q. How do you know that? What impressed your mind so you know it?

A. I know it because I am working up there.

Q. That is the best explanation you can give of it? A. Yes, sir.

Witness excused.

PLAINTIFF RESTS.

Mr. DONOHUE.—I have a motion to make.

Defendant at this time moves the Court to instruct the jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff, for the following reasons, to wit:

First: Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the \$1.50 per month deducted from his wages as hospital dues, was as follows: "He knew the defendant had a house equipped as a sort of a crude hospital with a woman in charge of the same. He knew nothing of any further method of caring for the injured [152] employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment."

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

Second: That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

Third: That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite, and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was, due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care

and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

Fourth: That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's [153] second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff under his alleged second cause of action is entirely too remote and uncertain to be ascertained from the evidence.

Fifth: That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of said injuries, will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

Whereupon the jury was excused and argument

(Testimony of L. L. Middlecamp.)

had upon the above motion.

The jury having returned—

By the COURT.—The motion presented by the defendant for an instructed verdict on the second cause of action will be denied and exception allowed defendant.

Mr. DONOHOE.—At this time the defendant moves that the Court grant a nonsuit against the plaintiff on his second cause of action on the same grounds presented in defendant's motion for an instructed verdict.

By the COURT.—This motion will also be denied and exception allowed.

Mr. DONOHOE.—We will call Mr. Middlecamp.
[154]

DEFENSE.

Testimony of L. L. Middlecamp, for Defendant.

L. L. MIDDLECAMP, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. L. L. Middlecamp.

Q. Where do you reside? A. Ellamar.

Q. What position do you occupy with the defendant company? A. Superintendent.

Q. Are you in charge of the operations of the company at Ellamar now? A. Yes, sir, now.

Q. How long have you been in that position?

A. Nine years.

Q. You are acquainted with the plaintiff in this

(Testimony of L. L. Middlecamp.)

action? A. Yes, sir, I am.

Q. You have a number of men employed in the mining operations of the company? A. Yes, sir.

Q. And has it been the custom of the company to deduct \$1.50 a month for hospital services?

A. Yes, sir.

Q. Just state what were the rules and customs of the company on the 12th day of January, 1916, and for several years prior thereto as to the hospital service you gave the employees.

A. In case of accident—

Mr. RITCHIE.—We object to “several years prior thereto.”

Objection overruled; plaintiff allowed an exception to the ruling.

A. (Continued.) Minor accidents, accidents of small consequence, were [155] treated there; ones that were serious were sent to Valdez, weather permitting.

Q. And those sent to Valdez—

A. We gave them to some local doctor.

Q. Some local doctor took care of them?

A. Yes, generally the one with a hospital.

Q. Was this custom generally known to all the employees during the year 1915 and up to January 12, 1916? A. Yes, sir.

Q. Was that the general custom of the mine during all of the time that the plaintiff in this action was in the employ of the company? A. Yes, sir.

Mr. RITCHIE.—We object to a general custom without showing a contract.

(Testimony of L. L. Middlecamp.)

The COURT.—The question is answered.

Mr. RITCHIE.—We move to strike it.

Motion denied; plaintiff allowed an exception.

Q. What arrangements did you have at the mine for treating employees who were slightly injured and giving first aid in a case of a serious nature?

A. The last couple of years or so we equipped a little tent right near Mrs. Tramontin's house, where she had bandages and different kinds of liniments and splints and a couple of beds, fitted up as a sort of first-aid hospital.

Q. Did you, along about January, 1916, have a better establishment, a better equipped establishment than that for the purpose of giving first-aid for minor injuries?

A. February or January?

Q. January.

A. We had the same building as for the summer time, but the weather was so severe we went to another building and we moved these [156] things over to the old hospital building; it was a warmer building—that was the only reason. It wasn't quite so convenient for the nurse but was a better constructed building and much better to use for the winter-time and the tent for the summer-time.

Q. How long previous to the 12th day of January, 1916, was it, since the company had a resident physician there, and surgeon?

A. The spring of 1908 it discontinued the hospital service.

Q. The spring of 1908? A. Yes, sir.

(Testimony of L. L. Middlecamp.)

Q. And from 1908 up until February, 1916, you had no resident physician at the mine? A. No, sir.

Q. And was it generally known in and about your mining works and by employees that you did not have a physician there?

A. Yes, I think it was.

Q. Now, this temporary hospital that you had in the winter of 1915 and 16, describe how it was equipped as to comfort or otherwise?

A. Well, as I said in the summer-time we had it in this tent because it was more convenient for the nurse. In the winter-time we had it in the old hospital building, on account of its being a better building and warmer. They were both equipped with hospital couches and different kinds of liniments, bandages, adhesive plasters, etc., to take care of minor accidents and injuries.

Q. Were the buildings both heated?

A. Yes, stoves in both buildings.

Q. Did you during the eight months previous to the 12th day of January, 1916, treat employees who were slightly injured at Ellamar?

A. Yes, we did.

Q. How many had you treated? [157]

A. A good many—I don't know how many, but a good many.

Q. On the 12th day of January, 1916, where were you? A. Los Angeles.

Q. You were temporarily absent from the mine?

A. Yes, sir.

Q. When did you return?

(Testimony of L. L. Middlecamp.)

A. The 19th of February, 1916.

Q. While out that winter, did you employ a competent physician and surgeon to attend upon the hospital at Ellamar, to open up the hospital at Ellamar?

Mr. RITCHIE.—We object as irrelevant, for the reason that this competent surgeon was not here at the time this accident occurred.

The COURT.—The objection will be overruled—you may cross-examine.

Plaintiff allowed an exception to the ruling.

A. Yes, sir.

Q. And when did he arrive at Ellamar, and open up the hospital for the reception of injured employees of the mine, and other people needing service?

A. He arrived on the 19th of February and immediately got the hospital in shape and had an operation on the 21st, I think, or 22d.

Mr. RITCHIE.—We move to strike that as irrelevant.

The COURT.—The testimony as to what was done subsequent to January 12th and subsequent to the time that the plaintiff left Ellamar can be received by the jury only as directed to the second cause of action and that particularly on the point as to negligence on the part of the company in affording a means to take care of the plaintiff at such a time thereafter as he may [158] have needed treatment and at such a time as being advised that he needed treatment, they offered to give him treatment; in other

(Testimony of L. L. Middlecamp.)

words, going to a question which the Court will have to instruct the jury upon, as to how far his action may constitute, that is the plaintiff's action, may constitute negligence on his part in accepting or failing to accept services that were offered. The motion to strike will be denied and exception allowed.

Q. When you opened this hospital on or about the 19th or 20th of February, 1916, just describe whether it was equipped with surgical apparatus, including an X-ray and other necessary apparatus?

Mr. RITCHIE.—Describe what it did contain.

Q. What did your hospital contain when you opened it up there, with the Doctor present, on February 20, 1916?

Mr. RITCHIE.—It is understood that all of this goes in under the same objection and exception?

The COURT.—Yes.

A. We started in with what we had to start in with, but while I was in Seattle, we purchased an X-ray machine, but it was several boats before the machine got there, and we purchased sterilizers and instruments and all that sort of thing, but it was a few boats before all this equipment arrived and we got it in shape, but within thirty days or six weeks all this equipment reached there and we had a first-class hospital, containing the X-ray machine and sterilizer, and the instruments we purchased in Seattle, and besides Doctor Gross' personal instruments, and we had two hospital beds in this hospital to take care of the sick and injured, and it was heated by a good stove, and running water, and I think compared fav-

(Testimony of L. L. Middlecamp.)

orably with any hospital around this part of the country. [159]

Q. You spoke a moment ago of Mrs. Tramontin—just state who she was, and in what capacity she was working for the company.

A. Mrs. Tramontin was the wife of one of my shift bosses and I later found out that she had seen considerable service as a nurse with the Treadwell Mining Company, and we one time and then another got sending her some minor cases, which she handled very satisfactorily to us.

Q. When you arrived at Ellamar about the 19th of February, 1916, did you see anything of the plaintiff around there anywhere? A. I did not.

Q. When did you first learn that the plaintiff was claiming that the company owed him some money for damages or compensation?

A. I got a letter from Mr. Ritchie along in April sometime—I will take that back, I think Mr. Ritchie saw me personally and talked it over on the street regarding the man having come to see him—I don't know what date that was, though.

Q. Some time in April you received a letter from Mr. Ritchie on the subject, did you? A. Yes, sir.

Q. As attorney for the plaintiff? A. Yes, sir.

Q. And what response did you make to that letter, if any?

A. I wrote Mr. Ritchie a letter and told him I had sent you the letter and instructed you to answer it, as our attorney.

Mr. DONOHOE.—We desire to offer this letter in

evidence (handing to Mr. Ritchie).

The letter is admitted, without objection, marked Defendant's Exhibit No. 1 and read to the jury by Mr. Bonnifield as follows:

Defendant's Exhibit No. 1—Letter, Dated April 22, 1916, from Messrs. Donohoe & Dimond to Messrs. Lyons & Ritchie.

Valdez, Alaska, April 22, 1916.

Messrs. Lyons & Ritchie,

Valdez, Alaska. [160]

Gentlemen:

Mr. L. L. Middlecamp, for the Ellamar Mining Company of Alaska has called our attention to your letter to him of recent date in which you call to the attention of the Company the claim of Tony Passos, or Tony Passiu, or Tony Passu, against it for compensation for an injury to the latter while in the employ of the Company at its mine at Ellamar, Alaska.

Mr. Middlecamp states that the Company has a physician and a surgeon in its employ at Ellamar, Alaska, authorized to practice medicine under the laws of the Territory of Alaska, and that the Company wishes to have an examination of your client made by such physician. The Company, therefore, requests Mr. Passos that he submit himself to examination by the Company's said physician at Ellamar, Alaska, forthwith, and the Company will pay and advance to him upon demand at our office the necessary transportation charges and expenses from Valdez to Ellamar and return, or will furnish such transportation. The Company, of course, cannot pay any transportation charges or any expenses

(Testimony of L. L. Middlecamp.)

whatsoever for any other surgeon or physician who may desire, or whom Mr. Passos may desire, to be present at such examination.

If, upon such examination, it is found that Mr. Passos is suffering from any physical injury incurred in his employment by it at Ellamar, Alaska, the Company is willing to give proper treatment for such injuries. It is obviously impossible to make any settlement until such examination has been made as is herein requested.

Your respectfully,

(Signed) DONOHOE & DIMOND,

By ANTHONY J. DIMOND.

Q. Did the plaintiff go to Ellamar for that examination?

A. Not in response to that letter.

The COURT.—Is the letter dated?

Mr. BONNIFIELD.—Yes, sir, April 22, 1916.

Mr. DONOHOE.—Mr. Ritchie, you acknowledge receiving that letter and indicating the contents to Mr. Passus?

Mr. RITCHIE.—Yes, sir.

Q. Now, later on, did anything come up that you know of regarding a further demand on this plaintiff to submit to any examination or to come down for hospital treatment?

A. Yes, in another letter you wrote to Mr. Ritchie you made a demand for him to submit to an examination.

Mr. DONOHOE.—We ask that this letter, dated Valdez, Alaska, August 22, 1916, addressed to Tony Passus of Valdez, Alaska, and Messrs. [161]

(Testimony of L. L. Middlecamp.)

Lyons & Ritchie, of Valdez, Alaska, his attorneys, be admitted in evidence and marked Defendant's Exhibit No. 2. (Handing paper to Mr. Ritchie.)

There being no objection the letter was admitted in evidence, marked Defendant's Exhibit No. 2, and read to the jury by Mr. Bonnifield, as follows:

Defendant's Exhibit No. 2—Letter, Dated August 22, 1916, from Ellamar Mining Co., to Tony Possus.

Valdez, Alaska, August 22, 1916.

To Mr. Tony Possus of Valdez, Alaska, and Messrs.

Lyons & Ritchie of Valdez, Alaska, His Attorneys:

Gentlemen:

In regard to your claim against the Ellamar Mining Company of Alaska for personal injuries, which you claim to have received while in the employ of this Company, and which you claim resulted in the fracture of your clavicle, we call your attention to the fact that some time ago the Ellamar Mining Company requested you to submit to an X-ray examination of your shoulder for the purpose of ascertaining whether your clavicle was really fractured or not, and that you have failed to do so.

The Ellamar Mining Company of Alaska at this time informs you that it now maintains at Ellamar, Alaska, a first-class hospital, equipped with all modern surgical appliances, including an X-ray, and has in attendance a first-class physician and surgeon.

The Company now makes you the following offer: It will either take you in the Company's launch, or

(Testimony of L. L. Middlecamp.)

pay your transportation from Valdez to Ellamar, at which place the Company's surgeon will make an X-ray examination of that portion of your clavicle you claim has been broken, and make a general and thorough physical examination of you, and perform any necessary operation for the purpose of correcting and healing any fracture of your clavicle, if such exists, and will furnish you with first-class hospital accommodations for the operation and until you are discharged as cured by the Company's physician and surgeon. In other words, it will furnish you free transportation to Ellamar, hospital accommodations and physician and surgeon for an examination, operation, if necessary, and until you have entirely recovered. The Company will also settle such claims in cash as you may be entitled to during the time you have been disabled under the provisions of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915.

Please let the Company know at as early a date as possible whether you accept or reject this offer.

(Signed) ELLAMAR MINING COMPANY,

By DONOHOE & DIMOND,

Its Attorneys. [162]

Mr. DONOHOE.—You admit that this was received by you and the plaintiff received it, Mr. Ritchie?

Mr. RITCHIE.—Yes—and I told the plaintiff the substance of it as near as I could.

Q. Did the plaintiff, in response to that last letter, go to Ellamar?

A. Yes, sir; he came to Ellamar.

(Testimony of L. L. Middlecamp.)

Q. Was he examined by Doctor Gross, the company's physician? A. He was.

Q. Did you have a conversation with him afterwards? A. Yes, I did.

Q. Just state that conversation as near as you can remember it.

A. Why, I asked him if he didn't want to remain in Ellamar and submit to this treatment, this massage, massaging, that Doctor Gross had offered him. He didn't seem to say anything; he seemed to be very eager to get some money, said he would make a complete settlement for two thousand dollars and I told him that we would be willing to have him stay at Ellamar and give him free treatment and take care of him in every way we could, without any charges, but we couldn't make a settlement of that kind, and he didn't say Yes or No about it, but he left on the boat that called in that afternoon.

Q. Has he been to Ellamar since?

A. He has not, to my knowledge.

Q. There was no further demands made upon you until this suit was brought? A. No.

Mr. DONOHOE.—That is all. [163]

Cross-examination.

(By Mr. RITCHIE.)

Q. Who was the judge of whether a case was serious or not?

A. Well we had the nurse there and we kinder leave it up to her judgment and my judgment too whether we thought it was serious, if I was there.

Q. There was no person in Ellamar during this

(Testimony of L. L. Middlecamp.)

time until Doctor Gross came there who knew any more about medicine or surgery than Mrs. Tramon-tin? A. Not to my knowledge.

Q. She had had some experience you say as a nurse and had some knowledge of physical injuries?

A. She had.

Q. Did anybody else know any more than she did or as much as she did?

A. Not to my knowledge.

Q. So if a man was injured quite seriously, but it was not visible or plain to inspection, even on complete inspection, such as an internal injury, for instance, there was no expert there to tell whether he was getting the kind of treatment he ought to have or not?

A. If there was any question about it, we wouldn't decide it but would bring it to Valdez. We didn't know about Westbrook's fracture until we got him to town, but we didn't want to take any chances about it.

Q. Is it not true that you didn't start for Valdez with him until twenty-four hours after he was hurt?

A. I can't say, I don't really remember; I know we got ready as soon as we could.

Q. Wasn't he hurt during the night time and you didn't start to Valdez with him until the next afternoon?

A. I think we started the next morning, I am not sure—I am very [164] sure it was in the morning, but I don't know how many hours it was. There is this much about it, we got ready as soon as we could.

Q. If there was a serious injury, if it was not visi-

(Testimony of L. L. Middlecamp.)

ble to the ordinary person not versed in medicine and surgery, a man might be kept there for days without anybody knowing that something more could be done for him, under your plan—isn't that true?

A. It is possible.

Q. That was the situation in the case of the plaintiff, if he really was suffering from a fractured bone then, there was no attempt made for a good many weeks to have the surgeon examine him to find out whether there was such a fracture?

A. I was not there,—I can't say what they did.

Q. How many men have been working at Ellamar most of the time the last year, during 1916?

A. From 85 to 100.

Q. Do you know how many were there in January, 1916? A. Probably 80 to 85, I should think.

Q. These communications with Mr. Possus were through me—you had no conversation with him yourself except this time in Ellamar?

A. I passed the time of day with him on the street here.

Q. That is the only time you talked to him about his case? A. Yes, sir.

Q. And did he give any reason at all for not going to the hospital there? A. No to me.

Q. He doesn't talk English very well, does he?

A. Not very well, no, but I could talk to him all right.

Q. It is rather difficult to understand him and make him understand very often, unless you repeat your questions two or three [165] different ways?

A. Except the very simple things things he is ac-

(Testimony of L. L. Middlecamp.)

customed to, in his work, etc.

Q. He has a very limited English vocabulary?

A. Yes, sir.

Q. As long as you confine yourself to the small words, he understands—you have no difficulty?

A. No.

Q. But when you get a strange word into the conversation he is at sea? A. Yes, sir.

Q. So it was not possible for you to have any general talk with him at that time?

A. I think we made ourselves understood.

Q. He didn't give any positive reason then why he didn't want to go to the hospital?

A. He did not, no, not to me.

Q. Did he refuse or simply, just simply, refrain from saying anything?

A. He didn't say much of anything.

(By Mr. DONOHOE.)

Q. At the time the plaintiff was at Ellamar was Mr. Gedney or Mr. Estey working for the company then? A. Yes, sir, both of them.

Q. Were they both present when he came down?

A. I thought you meant in February.

Q. No; the time you had this conversation at the end of August—was Mr. Gedney or Mr. Estey working for the company then?

A. No, neither one of them at that time.

Q. How long had Mr. Estey been away from there?
[166]

A. Mr. Estey left in June some time and Mr. Gedney left in October, but Mr. Gedney had been hurt—

(Testimony of L. L. Middlecamp.)

he was around there, I think, but he wasn't working for the company.

Q. Mr. Ritchie has asked you when you brought injured employees to Valdez in case of serious illness—I will ask you if your method of taking care of your injured employees is not the general method that is adopted at all mining camps in and about Prince Williams Sound?

Mr. RITCHIE.—Any reference to the customs of mining companies generally was stricken out at the defendant's request and I object to it on that ground.

Objection sustained; defendant allowed an exception.

Mr. RITCHIE.—In order to make this point in the record I want to ask a few more questions on the same line.

The COURT.—Very well.

Q. Do you know what the custom is at the Granite Mine for taking care of its injured employees?

Mr. RITCHIE.—We object to the question as not within the issues.

The COURT.—Objection will be sustained unless it is preliminary to showing that the plaintiff knew the custom at the Granite Mine.

Mr. DONOHOE.—I don't think we can prove that.

Objection sustained; defendant allowed an exception.

Q. Do you know of any mining camp in or about Prince Williams Sound, in January, 1916, that had at that mining camp a resident physician and surgeon, other than the Latouche mine?

Mr. RITCHIE.—We object as incompetent, irrele-

(Testimony of L. L. Middlecamp.)

vant and immaterial, and not based upon any issues of the case.

Objection sustained; defendant allowed an exception.

(By Mr. RITCHIE.)

Q. What was the precise authority of Mr. Estey and Mr. Gedney [167] respectively in January and February, 1916?

A. Mr. Gedney was foreman and Mr. Estey was bookkeeper and acting as a sort of assistant in my absence—it would really be under Mr. Estey's authority to handle a case of this kind, if I were not there.

Q. Mr. Gedney was at the head of mining operations?

A. Yes, sir, mining operations or getting out the ore underground would be under Mr. Gedney.

Q. The miners were accustomed to take orders from him? A. Yes, on shift they were.

Q. Wouldn't they naturally take orders from him about anything, even off shift, the same as they would any other foreman at any other mine? A. Yes.

Witness excused. [168]

Testimony of Mrs. S. A. Tramontin, for Defendant.

Mrs. S. A. TRAMONTIN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name?

A. Mrs. S. A. Tramontin.

Q. Are you acquainted with Mr. Middlecamp, the

(Testimony of Mrs. S. A. Tramontin.)

superintendent of the Ellamar Mining Company?

A. Yes, sir.

Q. Were you acquainted with him during the year 1915 and 1916? A. Yes, sir.

Q. You were residing at Ellamar on the 12th day of January, 1916? A. Yes.

Q. How long had you resided there previous to that date? A. Three years.

Q. You are acquainted with Tony Possus, the plaintiff in this case? A. Yes.

Q. Are you an experienced nurse?

A. Yes, sir.

Q. Did you have any experience or training as a nurse in Europe? A. Yes, for four years.

Q. Where? A. In Venice.

Q. You are a native of Italy? A. Yes, sir.

Q. How long did you have training in Venice?

A. Four years.

Q. Did you have any surgical experience?

A. Yes, sir.

Q. For how long? A. About four years.

Q. Was this a regular hospital where you had this experience? [169] A. Yes.

Q. You didn't graduate from there, did you?

A. Just before I graduated I was married.

Q. You married and didn't stay? A. Yes, sir.

Q. What was the course—how many years was the course?

A. It was about two years—four years' course in the hospital; four years I stay in Venice in the hos-

(Testimony of Mrs. S. A. Tramontin.)

pital and two years I have the course—two years for a trained nurse.

Q. That is, six years you had to put in altogether to get your certificate? A. Yes, sir.

Q. When did you first come to Alaska?

A. I went to Treadwell, Alaska, in the St. Ann Hospital, to attend to the surgical operations with Dr. C. Cole and J. F. Moore.

Q. How long were you there?

A. Fourteen years.

Q. Working in the St. Ann Hospital at Douglass?

A. For the patients there and at Treadwell.

Q. Did you have some considerable experience as a surgical nurse? A. Yes.

Q. Did this St. Ann's Hospital while you were there treat and take care of all the injured employees from the Treadwell mine?

A. Yes, sir; that is, all there was.

Q. Now, from the experience you have had as a surgical nurse, are you capable of taking care of minor injuries to a person? A. Yes.

Q. You were in Ellamar about three years, were you? A. About three years and six months.

Q. When did you leave Ellamar?

A. I left Ellamar about the 15th of September, 1916. [170]

Q. Last September? A. Yes.

Q. At this time you are not in any manner employed by the Ellamar Mining Company?

A. No, after I went away from there.

Q. Now, during these three years in Ellamar, did

(Testimony of Mrs. S. A. Tramontin.)

you take care of any injured employees of the company?

A. Yes, I took care of them all, and I take them to Valdez to Doctor Dalton, to the doctor in Valdez.

Q. Sometimes you made a trip to Valdez with the patients?

A. Yes, I made the trip with all the boys.

Q. If the patient was seriously injured, what did you do down there?

A. I took them to the doctor up here, to Doctor Dalton, to have all the operations.

Q. In case of a serious injury, you administered first-aid down there, did you? A. Yes, sir.

Q. Bandaged them up?

A. Bandaged them up and took good care of them until I reached the doctor.

Q. And you came right with them on the boat?

A. Yes, I never lost a one yet.

Q. Did you take care of any of the employees who were slightly injured at Ellamar, those that were only injured a little? A. Yes.

Q. Do you know of the plaintiff being injured on the 12th day of January, 1916?

A. Yes, sir; about five minutes after he got injured I went up and gave him a good cleaning and put in six stitches in his forehead.

Q. After he was injured he was brought to the hospital? A. Yes, right away. [171]

Q. And what injuries were noticeable when he was brought to the hospital?

A. First I thought he was only bruised; he com-

(Testimony of Mrs. S. A. Tramontin.)

plained of a bruise on the shoulder and a little cut in the forehead, on the left side.

Q. Point out the place where the bruise was on the shoulder? A. It was right here (indicating).

Q. And he had a cut over his left eye?

A. Yes, sir, he had a cut over his left eye.

Q. What did you do in regard to the cut over his left eye?

A. I cleaned it and sterilized it and give it stitches.

Q. How many stitches did you put in that cut?

A. Six.

Q. Was there any bruise on his jaw?

A. No, I didn't see anything.

Q. Did he complain to you of any bruise on his jaw?

A. No; only the forehead I know *on* and a little lump on the side.

Q. Did he complain to you of having a couple of teeth broken out? A. Not to me.

Q. What did you do about bandaging his arm up or his shoulder?

A. I bandaged it with adhesive plaster for three weeks.

Q. You had him bandaged with adhesive plaster for three weeks?

A. Yes, sir—and then they called Doctor Duck-wall.

Q. You bandaged him up that first night he was brought to the hospital? A. Yes.

Q. Did you bandage him so as to hold his arm up in this position?

(Testimony of Mrs. S. A. Tramontin.)

Mr. RITCHIE.—We object to that as leading.

Q. How did you bandage him ?

A. Just like that—so it was steady, for three weeks, and rubbed [172] him with liniment every day, twice a day.

Q. Did the plaintiff have any difficulty in seeing after you dressed up his eye—was the sight bad?

A. The sight of his eye?

Q. Yes.

A. He says after four or five days he feel all right and I didn't give him any pain and in ten days I took the stitches out and it was fine—he didn't complain of his eye.

Q. Was there anything wrong with his jaw?

A. He never told me anything about his jaw?

Q. Did he eat his meals pretty regularly?

A. Yes, three times a day.

Q. What did those meals consist of, what kind of food?

A. After he was brought to the hospital, anything he felt like eating—I asked him what he wants to eat.

Q. What did he eat after a day or so—what kind of food did he eat?

A. Soup and some kind of fruit—he ate more when he got up from bed, he couldn't eat much in bed.

Q. How long was he in bed?

A. About a week.

Q. After he got out of bed, at the end of a week, did he eat ordinary meals?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, he eat nearly everything.

Q. Did he eat beef steak?

Mr. RITCHIE.—We object as leading.

Q. What did he eat at his meals after he got out of bed at the end of the first week?

A. He eat soup and steak and fried eggs, something like that—everything he likes, because his stomach was all right.

Q. Did he complain that his jaw hurt him?

A. Not to me—he say nothing to me about his jaw.

[173]

Q. Did you and he have a conversation in which—

Mr. RITCHIE.—We object to that as leading.

Mr. DONOHUE.—It is that impeaching question—

Q. Did you and the plaintiff have a conversation in the hospital between the 12th of January and the 20th of January, 1916, at Ellamar, you and he being present and none other, in which the conversation was about as follows: You asked Tony if he wanted to go to Valdez and see a doctor and he said, “No; you done fine with the other boys; I don’t see why you can’t fix me up”?

A. Yes, sir; that is all he said to me.

Q. That conversation took place, did it?

A. Yes, that is all he said.

Q. Was that after he got out of bed or before?

A. After—well, it was about a week after his accident.

Q. About a week after he was injured?

A. Yes, sir.

(Testimony of Mrs. S. A. Tramontin.)

Q. Did he ever at any time complain to you about the treatment he was getting?

A. No, he never say nothing to me, only the shoulder.

Q. Did he ever at any time say to you he wanted a doctor to examine him?

A. No, he never said that to me—I tell the doctor to come and examine him.

Q. How long did the plaintiff stay in the hospital?

A. Three weeks.

Q. And did you take care of him all that time?

A. Took care of him twice a day all the time—dressed him twice a day.

Q. How long was it after he went to the hospital that he was able to dress himself, put on his clothes, if at all?

A. He went to the bunk-house after three weeks.

Q. Up to that time, you had his right arm bandaged up? [174]

A. Yes,—after that time he went to the bunk-house, after the doctor examined him.

Q. How come Tony to go to the bunk-house and leave the hospital?

A. Because there was another man injured there and we had to operate—Doctor Duckwall had an operation there so he went to the bunk-house because he said he was getting well.

Q. Did anyone tell the plaintiff to go to the bunk-house or get out of the hospital?

Mr. RITCHIE.—We object to that for the obvious reason that unless she was there and awake

(Testimony of Mrs. S. A. Tramontin.)

constantly, twenty-four hours in each day, she couldn't know about it.

Mr. DONOHOE.—I will reform it—

Q. Did you hear anyone tell the plaintiff to get out of the hospital?

Mr. RITCHIE.—We object to that as incompetent.

The COURT.—That goes to its weight rather than its competency—the objection will be overruled.

Plaintiff allowed an exception to the ruling.

A. Well, I don't hear anything, no—just Mr. Gedney and Mr. Estey talking together—I heard the two, I heard Mr. Gedney and Mr. Estey, he says, “Doctor Duckwall says he is well; he says there is no use to keep him here”; that is all he said.

Q. That conversation took place after he had left the hospital?

A. After, yes, after he was out of the hospital.

Q. The question I am asking you is this—did you, while the plaintiff was in the hospital, hear anyone tell him to get out of the hospital?

Mr. RITCHIE.—We object to that for the reasons stated before.

Objection overruled; plaintiff allowed an exception.

A. No, I don't hear that myself; I don't know if he said it to him; I didn't hear. [175]

Q. Did he tell you why he was leaving the hospital and going to the bunk-house?

A. No, he said Mr. Estey, he called him in to go to the bunk-house because he had the other patient

(Testimony of Mrs. S. A. Tramontin.)

there to operate upon in that same room.

Q. Do you remember Doctor Duckwall coming down to Ellamar? A. Yes, sir.

Q. And did you see the doctor, Doctor Duckwall, examine the plaintiff?

A. Yes, sir—I told Dr. Duckwall about Tony Possus and Doctor Duckwall examined him and said he couldn't find anything.

Q. Where did this examination take place—where was it? A. In the hospital.

Q. Were you present? A. I was present; yes.

Q. Did Dr. Duckwall require the plaintiff to take off his clothing down to his waist line?

A. Yes, sir.

Q. And how did he proceed to examine him?

A. Why, he examined him for his shoulder.

Q. What did he make him do?

A. He make him do that way and the other way (indicating)—of course I can't do it because I have my clothes on and he has to go to this side and then to the other and this way (indicating) three times and Doctor Duckwall says, "That is all"; he says, "You are all right."

Q. Did the plaintiff have trouble in putting his right hand up here this way (indicating) when he was examined?

A. The doctor says—of course I don't know, there was a doctor there— (Answer stricken out as not responsive.)

Q. Did the plaintiff Tony have any trouble in putting his right hand [176] up on top of his head?

(Testimony of Mrs. S. A. Tramontin.)

A. Well, I don't see any—I don't know.

Q. Did he complain of any pain when he did that?

A. No, he didn't say he had pain.

Q. And he made him put his right hand on his left shoulder? A. Yes, sir.

Q. And his left hand on his right shoulder?

A. Yes, and Doctor Duckwall put a mark how far the hand went on a book—that is all I know.

Q. And he made him extend his two arms out in front of him?

A. Yes, sir; that way (indicating).

Q. And measured the lengths? A. Yes, sir.

Q. And made him do the same thing behind him?

A. Yes, sir.

Q. And what did Doctor Duckwall say in your presence to the plaintiff after he made this examination?

A. Well, he said, "This man is all right"—I had nothing to do after, I never said anything when the doctor said that way.

Q. Did the plaintiff, Tony, at any time while in the hospital and while you were treating him, complain of any broken bones or a broken clavicle?

A. No, when he says about his side, his shoulder, he was complaining it was sore.

Q. The shoulder was sore? A. Yes, sir.

Mr. DONOHOE.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You are sure that Tony was in the hospital for three weeks after [177] he was hurt?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, sir.

Q. You kept a record?

A. I kept a record, yes—three weeks.

Q. And he went out of the hospital when Doctor Duckwall came down there to treat another man?

A. Yes, one day before, because a man got injured like to-day and Doctor Duckwall came the next morning.

Q. And did he come back to the hospital to stay after that?

A. No, he stayed at the bunk-house.

Q. At the time he was brought to the hospital, you made the first examination of him, yourself?

A. Yes, sir.

Q. You were called in yourself? A. Yes, sir.

Q. Was he conscious then or unconscious?

A. No, he was only scared, not unconscious at all, just afraid.

Q. He was conscious of what was going on around him? A. No, I never seen him unconscious.

Q. Did he have his senses?

A. Yes, he had his senses; oh, yes.

Q. He could see and hear and talk to you?

A. Yes, sir, he talked to me; he said, "Am I hurt very bad?" and I said, "Not very bad; you will be all right."

Q. Tony doesn't talk much?

A. No, he don't talk plain English—some words he can talk.

Q. He is not inclined to talk much at any time?

A. No, he don't talk much—he always kept quiet.

(Testimony of Mrs. S. A. Tramontin.)

Q. He says very little unless somebody talks to him and asks him questions? A. Yes. [178]

Q. And that night, in fixing him up, did you ask him questions as to where he felt pain or anything of that kind?

A. No, because he was kind of sleepy, so I leave him quiet.

Q. When you were fixing him up, did you put a bandage on him that night?

A. Yes, and the stitches, and put him to bed.

Q. Did you ask him then, at that time, whether he was suffering any pain or where?

A. Yes, he said—he always complained of his shoulder.

Q. It was in the shoulder that made him the most trouble?

A. Yes, sir, the shoulder made him the most trouble.

Q. Did he try to point out where it hurt him?

A. Yes, sir.

Q. And what was your impression of the injury at that time?

A. I thought he was only bruised at first.

Q. What was the appearance of the shoulder, was it discolored in any way? A. Yes, it was black.

Q. How large a spot?

A. A large spot, here (indicating).

Q. Near the point of the shoulder, pretty well up to the middle? A. Yes.

Q. And how wide was it discolored?

(Testimony of Mrs. S. A. Tramontin.)

A. Well, it was about four or five inches, about that much.

Q. Four or five inches long and how wide?

A. About two inches wide.

Q. The whole upper part, nearly the whole upper part of the shoulder was black and blue?

A. Yes, this side, the front and back.

Q. Was it swollen any? [179]

A. Not swollen; just black.

Q. Do you know how long this was after he was hurt? A. It stayed that way two weeks.

Q. When you first got hold of him, how long was it since he was hurt, did the men tell you?

A. When he was brought to the hospital?

Q. Yes—did the men who brought him say how long it was since he was hurt?

A. Ten or fifteen minutes—ten minutes.

Q. You put a bandage on that night?

A. Yes, sir, in the night.

Q. And bound up his right elbow? A. Yes, sir.

Q. Why did you do that?

A. Because I thought maybe rubbing him with liniment, if he is sore in his muscles, I thought maybe it would be all right.

Q. Did you feel his shoulder carefully especially on top, to see whether there was any bone broken?

A. I don't find any—I couldn't notice any bone at the time.

Q. You tried? A. Yes, sir, I tried.

Q. And it was your opinion there was no bone broken? A. I think so; yes.

(Testimony of Mrs. S. A. Tramontin.)

Q. Why did you bind up the elbow that way—that is, bind up the arm from the elbow? Did you think there was a strained muscle?

A. I thought there was a strained muscle and to rub it with the liniment and keep him still that way, maybe it would be all right, maybe it would be better.

Q. At that time you were of the opinion that there was no bone broken at all?

A. Yes, that is what I thought.

Q. When did you change that bandage? [180]

A. Every three or four days.

Q. You kept the same kind of a bandage on him constantly? A. I change it all the time.

Q. The same kind? A. The same kind; yes.

Q. You kept the arm bound up that way?

A. Yes, sir.

Q. And put adhesive plaster in strips on him?

A. Yes, sir.

Q. Whereabouts did you put them on his body? Did you put just enough of them to hold the bandage in place?

A. To keep the bones all right after the liniment.

Q. To keep the bones of the shoulder all right?

A. Yes, sir.

Q. In case there was a fracture? A. Yes, sir.

Q. You were not certain whether there was or not?

A. I didn't know—I asked the doctor was there and the doctor said he thought it was good.

Q. What was the object of those strips of plaster?

A. The surgeons always used them.

(Testimony of Mrs. S. A. Tramontin.)

Q. What is the object of putting those strips of plaster on?

A. To keep the bone kinder straight—if he move it don't hurt the bones that way.

Q. Sometimes when they put a tight bandage on a person, they put strips of this adhesive plaster over it to hold the bandage in a tight position?

A. Yes.

Q. Was there any other object than that in this case—did the plaster itself have some object in holding things in place or [181] was it only put on to hold the cloth bandage in place?

A. No, to keep the arm still for a while.

Q. You only took the bandage off finally just before he left the hospital?

A. That is all and after he left the hospital, he comes two or three times and I rub him with liniment too.

Q. Would you leave it off sometimes two or three hours or put a new bandage on immediately after taking it off?

A. I take it off and put on a new one.

Q. How long did he stay in bed? A. One week.

Q. And then after that did he sit up every day?

A. Yes.

Q. And walk around?

A. And walk around the hospital there.

Q. He staid in the hospital all the time?

A. Yes, sir.

Q. And what did he wear when he would get out of bed besides his coat?

(Testimony of Mrs. S. A. Tramontin.)

A. A night-gown and a coat. I took his sleeve out for three weeks and he put the coat on.

Q. He wore a night-gown and had his coat around him? A. Yes, sir.

Q. Did you see him after he left the hospital?

A. No,—I seen him once or twice after; I was busy.

Q. About the injury to his mouth—you say he made no complaint of that? A. No.

Q. Didn't he ever tell you about his jaw being stiff?

A. No, never told me anything—he don't talk much, of course.

Q. Did he ever say anything about being unable to open his mouth wide? [182] A. No.

Q. All his complaints were about his shoulders?

A. Yes; all his complaint was about his shoulders and his forehead here where he was cut, where he had the cut.

Q. Where he was hit over the eye?

A. Yes, a long cut in the side of the cheek there.

Q. Did he talk much to you about his case except when you asked him questions?

A. No, only when I ask questions; he don't talk much.

Q. He seldom talked to you unless you asked him questions? A. That is all.

Q. And you usually asked him about his shoulder?

A. Yes.

Q. And about his eye, where he had been cut and you had to take the stitches?

(Testimony of Mrs. S. A. Tramontin.)

A. Yes, he was all right anyway in about two weeks.

Q. That is what you talked about?

A. Yes, and his shoulder—I asked if it hurt him.

Q. Did you ever ask him about his mouth?

A. No.

Q. There was never any talk between you about that at all? A. No.

Q. Did you ever notice that in eating he didn't open his mouth wide at all?

A. He didn't eat much for twenty-four hours, but after that he is eating all the time.

Q. He lived mostly on soup for a week?

A. Soup and eggs and fruit.

Q. The first few days he lived almost entirely on soup, and afterwards began eating eggs?

A. Yes, and he ate meat, too. [183]

Q. You are sure he ate meat? A. Yes.

Q. How soon did he begin to eat meat?

A. About the third day.

Q. You were present when Doctor Duckwall examined him? A. Yes, sir.

Q. It was your business to give first-aid to the injured down there and your opinion on what was the matter with the patient was generally taken, was it not—you were a nurse and were supposed to know really more about injuries than anyone else in Ellamar? A. Yes.

Q. Whenever anybody was hurt it was put up to you to find out what the matter was and do something for them as soon as you could and as far as

(Testimony of Mrs. S. A. Tramontin.)

you could? A. Yes, sir.

Q. And you passed judgment on all the cases?

A. Yes, sir.

Q. When was anything said between you and Tony about his coming to Valdez or going to Cordova to see a doctor?

A. He never said anything to me.

Q. He never said anything about it?

A. He never said anything about it.

Q. You asked him once whether he wanted to see a doctor?

A. Yes, I asked him if he wanted to see a doctor.

Q. Where were you sending persons who were badly hurt at that time?

A. I always take them to Valdez to Doctor Dalton or to Fort Liscum.

Q. Did you start one to Cordova?

A. No, I start one, I start two, to Seattle, to the specialist.

Q. You never sent anyone to Cordova?

A. No, I never sent anyone to Cordova. [184]

Q. When did you send anybody to Doctor Dalton for the last time?

A. The last time was in the month of June.

Q. Did you ever send anyone to Doctor Duckwall, after Ike Westberg?

A. Only one—and for Mr. Gedney.

Q. You have had quite a long experience for a nurse and you have stated that you have seen a great many bone fractures? A. Yes, sir.

Q. Do you think you are pretty well qualified to

(Testimony of Mrs. S. A. Tramontin.)

tell whether a man has a broken bone or not by feeling it?

A. In some men you can, and some you cannot, especially when he is fat it is hard to tell.

Q. Even if they have a doctor, even Doctor Dalton couldn't find out with an X-ray—it is hard to tell?

A. A thin man you can feel the bones and tell right away, but a fat man it is hard to tell by feeling the bones.

Q. You never did make up your mind whether he had a broken bone or not?

A. No, I never thought—

Q. Were your instructions to use your own judgment about cases?

A. Yes, I always asked the doctor.

Q. I mean in cases of an injury, when it first came to you—you passed judgment on it, whether it was a serious injury or not? A. Yes, sir.

Q. And didn't you usually, if you thought it was serious, recommend taking him to the doctor at once?

A. If the case is not familiar, of course, I take him to the doctor.

Q. It is only twenty-eight miles from Ellamar to Valdez? A. Yes, sir.

Q. Didn't you think this was a serious enough case to send to Valdez or Fort Liscum at once?

A. If he says anything to me I send him—he don't say anything to me. [185]

Q. You have been a nurse for nearly twenty years?

A. Yes, sir.

Q. Is it not true that in most instances that when

(Testimony of Mrs. S. A. Tramontin.)

a man is hurt he don't know how badly he is hurt except that he suffers pain? A. Yes, sir.

Q. Don't you think it was up to you to use your judgment and not to ask him?

A. I asked him if he wanted to go to Valdez.

Q. Don't you think if there was any doubt whether he was seriously injured, it was your duty to send him to a doctor or recommend that he be sent?

A. Yes; anyone that is injured I send to a doctor.

Q. Did you suggest to Mr. Estey that Tony be brought to a doctor?

A. No, I never suggest anything to Mr. Estey.

Q. You didn't think it was a serious enough case?

A. No, I didn't think it was a serious enough case to take him to the doctor.

Q. When a man has had his shoulder so badly hurt that you keep a bandage on it for three weeks, don't you think that is a serious enough case to send to a regular physician?

A. Sometimes it is bruised and in two or three weeks it is better.

Q. Was the shoulder swollen?

A. It never did swell much.

Q. You kept him in bandages for three weeks, but there was never anything about the case that made you think a doctor ought to see him?

A. Dr. Duckwall told me the shoulder is all right.

Q. That was several weeks afterwards?

A. Yes, sir.

Q. Before that time you didn't think it was necessary to send him to a doctor? [186]

(Testimony of Mrs. S. A. Tramontin.)

A. I never think—

Q. Don't you think it is a good idea to play safe in these cases? A. Yes, sir.

(By Mr. DONOHOE.)

Q. What conversation took place between you and Tony at the time you took the stitches out of the wound over his eye—what did he say at that time in regard to your treatment of him?

Mr. RITCHIE.—We object to that because Mr. Possus is not a physician or surgeon; he might appreciate the kindness to him but not know whether it was competent treatment.

Objection overruled; plaintiff allowed an exception.

A. He says, "I am very pleased I get so well; I haven't even got a scar on my eye"; he says, "It can't be any better than that; I never got a scar at all with all the stitches."

Witness excused.

Mr. DONOHOE.—At this time the defendant desires to offer in evidence the testimony of Doctor Duckwall, as it has been stipulated it might go into the record in the case.

The COURT.—The stipulation may be read and received as evidence in the case.

Mr. Bonnifield reads as follows:

(Title of Court and Cause.)

Deposition of Bertram F. Duckwall, for Defendant.

It is hereby stipulated and agreed by and between the plaintiff and defendant, acting through their respective attorneys of record, that in order to prevent

(Deposition of Bertram F. Duckwall.)

a postponement of the trial of the above-entitled cause for the purpose of securing the testimony [187] of Bertram F. Duckwall, a witness for defendant, who now resides in Eagle Pass, Texas, that the hereinafter statement of Bertram F. Duckwall's testimony shall be admitted as his deposition, with the same force and effect as if the said Bertram F. Duckwall was present in court and after being first duly sworn in this case to tell the truth, the whole truth and nothing but the truth had testified orally in court, and that said statement may be read in evidence at the trial of this cause or at any subsequent trial and shall be received by the Court and Jury as the sworn testimony of the said Bertram F. Duckwall in this case.

The plaintiff, however, reserves the right to object to any portion of said testimony, on the ground that the same is irrelevant, immaterial or incompetent; said objections, if any, shall be made at the time said testimony is offered in evidence at the trial and should the Court sustain said objections to any portion of said testimony, the same shall thereupon be ruled out and not received or considered by the jury, but all of said testimony which is admitted by the Court shall be received and considered by the jury as the sworn testimony of the said Bertram F. Duckwall, a witness on behalf of defendant.

TESTIMONY OF BERTRAM F. DUCKWALL.

My name is Bertram F. Duckwall. I am a captain in the Medical Corps of the United States Army; at this time, to wit: January 3d, 1917, I am

(Deposition of Bertram F. Duckwall.)

stationed at Eagle Pass, Texas.

I took a complete course in medicine and surgery in the University of Michigan and graduated as an M. D. from that institution in 1911. I entered as a first lieutenant, medical reserve corps of the United States Army, on the 28th day of November, 1911. I graduated from the United States Army Medical School in the year 1913. On the 27th day of May, 1913, I [188] entered as first lieutenant the Medical Corps of the United States Army and since was raised to the rank of captain in said medical corps. I have had an extensive experience in surgery and in generally treating and caring for patients who have received personal injuries, and am, and was, during the entire year of 1916 capable and competent to properly examine, care for, treat or perform any necessary operation on a person suffering from a fractured clavicle or a dislocation of the clavicle or a fracture or dislocation of any of the shoulder bones.

During the year 1915 and during the months of January, February and March, 1916, I was stationed at the United States Army Post at Fort Lisicum, a few miles from the town of Valdez, in the Territory of Alaska; that on or about the 9th day of February, 1916, I arrived at Ellamar, Alaska, in response to a summons by the Ellamar Mining Company of Alaska, to treat an employee of said company who was suffering from a broken leg. While there, on the 10th day of February, 1916, at the request of said defendant company, I made a care-

(Deposition of Bertram F. Duckwall.)

ful and thorough physical examination of Tony Possus, the above-named plaintiff, for the purpose of ascertaining if his right clavicle was fractured or broken or his right shoulder in any manner injured.

In making said examination I caused said plaintiff to remove all his clothing from his body down to the waist line and carefully examined the surface of his body all over his right shoulder and right clavicle and compared his right shoulder and right clavicle with his left shoulder and left clavicle and carefully felt the entire surface in the region of his right clavicle and right shoulder. I then required the plaintiff to perform the necessary physical exercises— [189]

Mr. RITCHIE.—We object to the reception of that statement as to his requiring the plaintiff to perform the necessary physical exercises because that is a conclusion of the witness; he should describe what exercises he refers to. He says he performed the necessary exercises but he don't say what they were—one doctor might think one exercise was necessary and another that it was not.

Objection overruled; plaintiff allowed an exception to the ruling.

(Mr. Bonnifield continues reading, as follows:)
I then required the plaintiff to perform the necessary physical exercises, with his arms, which would demonstrate if his right clavicle was broken or fractured; or any bone of his right shoulder dislocated. From said examination I am positive that, at that

(Deposition of Bertram F. Duckwall.)

time, the said plaintiff did not have a fracture of his right clavicle and that his right clavicle was not broken and that plaintiff's right shoulder, at that time, as well as his right clavicle was entirely normal and that no bones thereof were dislocated; and that said plaintiff's right shoulder was, at that time, in its normal condition and there was no reason why plaintiff could not use his right arm and right shoulder to its full normal strength.

I thereupon notified the plaintiff that there was nothing wrong with his right shoulder or right clavicle and that he could go to work in the mine, as a miner, any time he wanted to; I also at the same time notified the officers of the defendant company, in charge of the defendant's mining operations, at Ellamar, Alaska, that the plaintiff's right clavicle and right shoulder were in their normal condition; that said clavicle was not broken or fractured and was not [190] dislocated and that there was no reason why the plaintiff could not then use his right arm and right shoulder to its full normal strength and there was no reason, in my opinion, why the plaintiff could not, at once, resume his work as a miner.

The physical exercises which I required the plaintiff to perform at the time of making said examination could not have been performed by him had his right clavicle been fractured or broken or even dislocated; Mrs. Tramontin, the nurse in charge of the company's temporary hospital, was present at the time of this examination and saw the exercises which

(Deposition of S. A. Tramontin.)

I required plaintiff to perform.

Dated at Valdez, Alaska, this 3d day of January, 1917.

LYONS & RITCHIE,

Attorneys for Pltff.

DONOHUE & DIMOND,

Attorneys for Deft.

Mr. RITCHIE.—I want to recall Mrs. Tramontin for one or two questions brought out by this deposition.

The COURT.—Very well.

Testimony of Mrs. S. A. Tramontin, for Defendant.

Mrs. TRAMONTIN, recalled.

(Questions by Mr. RITCHIE.)

Q. Do you know why Doctor Duckwall examined Tony to see whether his clavicle was broken?

A. I called Doctor Duckwall to examine Tony—I told Dr. Duckwall.

Q. Was there anything about the condition there at that time, the condition of the shoulder, to lead you to believe it was fractured, the bone was fractured?

A. I didn't see any pain at the time the doctor examined him.

(Answer stricken out as not responsive.)

Q. I want to know whether there was anything in Tony's condition or the complaints he was making at that time that made you think that his clavicle was really broken? [191]

A. Well, he never said anything—he never complained of anything.

(Testimony of Mrs. S. A. Tramontin.)

Q. Then why did you or somebody else ask Doctor Duckwall to examine him to see if it was broken?

A. Because he was complaining all the time, he said his arm is sore, his arm is still sore.

Q. And his shoulder?

A. And his shoulder is sore, right in here (indicating).

Q. He complained of pains and soreness in the region of the clavicle? A. Yes, sir.

Q. And that made you think there might be an injury there?

A. Yes, I thought there might be something.

Witness excused.

WHEREUPON, court adjourned until to-morrow (Saturday), at ten o'clock A. M.

Saturday, January 6, 1917—Morning Session.

Mr. DONOHUE.—We will call Doctor Gross.
[192]

Testimony of Elmer C. Gross, for Defendant.

ELMER C. GROSS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. State your full name. A. Elmer C. Gross.

Q. Where do you reside? A. Ellamar, Alaska.

Q. What is your profession?

A. Practicing medicine and surgery.

Q. From what school did you graduate?

A. John Hopkins University Medical School, Baltimore.

(Testimony of Elmer C. Gross.)

Q. When did you graduate from that institution?

A. In June, 1911.

Q. Where did you first begin to practice?

A. In Seattle, Washington.

Q. With whom were you associated in the practice of medicine and surgery in Seattle, Washington?

A. During the second year of my stay there I was associated with Doctor Lowe and after that with Doctor Parke Reed Willis.

Q. Did Doctor Willis have a contract with the Seattle Electric Co? A. He did.

Q. For taking care of its injured employees?

A. Yes, sir.

Q. And did he have a contract with any other concern for taking care of its injured employees?

A. He had several other contracts, yes.

Q. What part of Doctor Lowe's practice was principally under your charge, if any?

A. Doctor Lowe was in private practice—he had no contract.

Q. Which doctor was it that had the contract?
[193] A. Doctor Willis.

Q. What portion of Doctor Willis's practice was under your supervision and control?

A. Most of the contract work?

Q. Of that contract work did you have the taking care of injured employees or persons of the Seattle Electric Company? A. I did.

Q. Did you have an extensive experience and practice in caring for injured persons?

(Testimony of Elmer C. Gross.)

Mr. RITCHIE.—We object to that.

Q. How extensive was your experience in taking care of injured persons?

A. There were a great many people injured in that work and I saw all the cases of injury that came under the Seattle Electric Company and the Northern Pacific Railway—that part we were taking care of.

Q. How many years did you put in in that practice? A. It was about two years.

Q. In the course of that practice did you from time to time have any occasion to treat and examine patients whose clavicle had been broken?

A. On several occasions I had such cases.

Q. From your experience in that practice of two years, have you had sufficient experience and from your general knowledge of surgery and medicine—have you had sufficient experience and knowledge to examine a patient to ascertain the condition of his clavicle and other bones in the region of his shoulder?

Mr. RITCHIE.—We object to that as calling for the doctor's opinion as to his qualifications.

Objection overruled; plaintiff allowed an exception. A. I think I have. [194]

Q. Did you, during your practice with Doctor Willis, have any experience in taking X-ray photographs of patients for the purpose of ascertaining the extent of their injuries? A. Yes, sir, I did.

Q. To what extent did you have that experience?

A. I did practically all of the X-ray work for Doctor Willis during that time.

(Testimony of Elmer C. Gross.)

Q. About how frequently during those two years would you be called upon to make X-ray examinations and take pictures of injured persons?

A. I think perhaps we would average about two or three X-ray pictures a day.

Q. And that practice continued for almost two years? A. Yes, sir.

Q. When did you first take up your residence at Ellamar? A. In February, 1916.

Q. And what position do you occupy with the Ellamar Mining Company at this time?

A. I am physician and surgeon for the company.

Q. And have been that since you arrived there in February, 1916? A. Yes, sir.

Q. Just describe the equipment of the hospital at the Ellamar mine at this time.

Mr. RITCHIE.—We object, on the ground that they did not have this equipment at the time this plaintiff was injured or at any time while he was under their care.

The COURT.—The evidence may be received by the jury for the limited purpose, as stated yesterday, relative to the testimony of Mr. Middlecamp on the same subject. The objection will be overruled and plaintiff allowed an exception.

A. We have a hospital there equipped to take care of any form of— [195]

The COURT.—I think your question is too broad, that is, up to the present time—I think it should be limited to the 22d of August, 1916, if that is the date.

(Testimony of Elmer C. Gross.)

Mr. DONOHUE.—Very well; those other questions may be stricken out.

Q. When did you first get your hospital there equipped for the reception of patients?

Mr. RITCHIE.—We object to that, same objection, and take an exception.

A. It was equipped for the reception of patients—I arrived there on the 19th and on the 22d we were in shape to take in patients.

Q. How do you fix it as the 22d?

A. I had occasion to admit a patient at that time and took care of him in the hospital.

Q. Did you perform an operation at that time?

A. I did.

Q. Now, when did you install the surgical apparatus completely in the hospital?

Mr. RITCHIE.—We make the same objection.

Objection overruled; plaintiff allowed an exception.

A. Well, it wasn't all installed at one time; the surgical equipment has been added to during the time I have been there.

Q. I will ask you if, by the first of April, 1916, you had it equipped with the X-ray apparatus and other necessary surgical appliances?

Same objection—objection overruled; plaintiff excepts.

A. I did.

Q. Was the equipment maintained there up to and including the 5th day of September, 1916?

Same objection: overruled: plaintiff excepts

(Testimony of Elmer C. Gross.)

A. It was. [196]

Q. And has it been maintained from that time on?

Mr. RITCHIE.—We make the same objection.

Mr. DONOHOE.—The purpose of that question is this: The examination that Doctor Gross did make of the patient was on the 5th day of September. I want to show that had the patient accepted the treatment offered him there, that the hospital was still maintained so he could have received it—if it ceased to exist on the 5th of September, there would be no advantage in accepting the proposition.

The COURT.—The objection will be overruled and the evidence may be received by the jury for the limited purpose I have indicated; plaintiff excepts.

A. It has.

Q. Now, describe the surgical equipment and appliances of the hospital from the time they were installed.

Same objection; objection overruled; plaintiff excepts.

A. Well, we have the surgical instruments that are required for any operation that it might be necessary to perform. We have a sterilizer for the preparation of dressings and liniment and tools, etc., used in such work, and we have an X-ray machine for the purpose of taking X-ray pictures and the hospital is equipped with bed; we have running water.

Q. Would you say that it was a well-equipped hospital for taking care of all injuries received in accidents to persons? A. I would say that it was.

Q. You say you were prepared to take patients

(Testimony of Elmer C. Gross.)

into the hospital, and did take patients in as early as the 22d day of February, 1916?

Same objection; objection overruled; plaintiff excepts.

A. Yes.

Q. When did you first meet this plaintiff, Tony Possus? A. On September 5, 1916. [197]

Q. Did he come to the hospital at that time?

A. He did.

Q. Did you make an examination of him?

A. I did.

Q. Just describe to the jury what you did in making that examination.

A. I had the patient remove the clothing from the upper part of his body, as he complained of trouble in the shoulder, and asked him to go through various manoeuvres which would indicate to me if there was trouble about the shoulder and what the extent of that trouble was.

Q. Will you just illustrate to the jury what manoeuvres you required the plaintiff to go through? And if he did go through any? First, did he comply with your request to go through these exercises?

A. He did.

Q. Illustrate to the jury what manoeuvres or exercises he performed for you so you might ascertain if there were any injuries in his right shoulder?

A. He was asked to place his right hand on the left shoulder, which he did without complaining of pain.

Q. That was, with his arm across his breast, was it?

(Testimony of Elmer C. Gross.)

A. Yes, sir. And then he was asked to put the other hand acrossed and the measurements taken to see whether there was any difference in the distances to which he could put the one or the other over; and he was asked to throw the arms back in this position (indicating).

Q. What position would you call that—to throw the arms back did you say?

A. We would call that extension backward. [198]

Q. Extending his arms backward?

A. Yes, sir. To determine if there was any difference in the extent to which one arm or the other raising the arm up in this position (indicating). and I could note no difference in the amount of extension back. He was asked to raise the right arm in this position (indicating)—

Q. How far was he to raise it, horizontally with the shoulder or how?

A. He was to raise it as far as he could; first, to raise it in a horizontal position and then to raise it as far as he could. He complained of some pain in raising the arm up in this position (indicating).

Q. That was, up to a perpendicular position?

A. Yes, sir. He was, howeevr, able to raise the arms up in this position (indicating) and one as far as the other, although he complained of some soreness over the point of the shoulder, as he raised his arm.

Q. He was able to raise both his arms in a perpendicular position up over his shoulder?

A. Yes. He was asked to place his right hand be-

(Testimony of Elmer C. Gross.)

hind his head which he did, although he complained of some slight soreness over the point of the shoulder. He was asked to place his hands out in this position (indicating).

Q. That was, both arms extended directly in front of him, was it?

A. Yes, sir. I was standing directly in front of him, keeping the medical line direct and bringing the hands out, so the line between the hands would be perpendicular to the body, and this was to determine whether there was any difference in the length of the two arms held out directly this way (indicating), which might be due to the abnormal position of the shoulder. I [199] could detect no difference in the two arms in that manoeuvre.

Q. The object of these various movements that you have given was to determine whether there was any deformity or disability in the shoulder, which would prevent him from using the right arm as he did the left?

A. Well, he complained of soreness in elevating the arm. There was nothing evident that kept him from putting his right arm in any position he could the left—there was no obstacle to prevent the motion; the only thing was the pain that he complained of in raising the arm.

Q. Doctor, are the exercises or manoeuvres which you have just described the tests prescribed by standard authors on surgery to determine if there are any defects in the shoulder or clavicle?

A. I think they are; I don't know that there are

(Testimony of Elmer C. Gross.)

any series of tests that are compiled together to show these things, but they are the motions that are ordinarily used to determine trouble about the shoulder joint or arm.

Q. Or clavicle? A. Yes.

Q. Have you in your past experience as a physician and surgeon used these manoeuvres and exercises for the purpose of determining whether there was any defect in the shoulder or clavicle of a patient? A. I have.

Q. Now, what further examination did you make of the plaintiff at this time?

A. I examined the region of the shoulder carefully. During these manoeuvres I kept my hand over the joint and movable parts of the shoulder at that time to detect whether there was any, what we call grating, a thing which cannot only be heard [200] but felt. If there is any trouble in the joint, like the motion of a broken bone together, it gives a grating sensation which can both be felt and heard. I manipulated the various movable parts of the arm and carefully felt over the bones that were accessible.

Q. Did you during these exercises discover any grating of any bones, either of the right clavicle or the region of the right shoulder?

A. None whatever.

Q. Could you from that examination definitely determine if there was a fracture of the right clavicle with separation at that time? A. I could have.

Q. Was there such a condition?

A. I found none.

(Testimony of Elmer C. Gross.)

Q. What would you say was the condition of the right clavicle as to being fractured with separation at that time or otherwise?

A. I would say it was not fractured and was not separated?

Q. Did you take an X-ray photograph of the plaintiff at that time, of his right shoulder? A. I did.

Q. And also of his left shoulder? A. Yes, sir.

Q. Have you those photographs?

A. I have. (Witness produces them.)

Q. Will you examine these photographs and explain to the jury the condition you found the clavicle in? Just identify that first; what have you at this time in your hand?

A. This is an X-ray photograph of the left shoulder.

Q. Of the left shoulder of the plaintiff. [201]

A. Yes, sir.

Q. Taken when? A. Taken September 5, 1916.

Q. By yourself? A. By myself.

Mr. DONOHOE.—We offer this in evidence and ask it be marked as Defendant's Exhibit No. 3.

It is so marked and admitted in evidence without objection and made a part of this record.

Q. What have you in your hand at this time?

A. This is an X-ray photograph of the right shoulder, taken September 5, 1916, by me.

Q. Of the plaintiff? A. Yes.

Mr. DONOHOE.—We offer it in evidence.

It is admitted in evidence, without objection,
It is admitted in evidence, without objection,

(Testimony of Elmer C. Gross.)

marked Defendant's Exhibit No. 4 and made a part hereof.

Q. What have you now in your hand?

A. This is another X-ray photograph of the right shoulder of Tony Possus taken September 5, 1916.

It is offered in evidence and admitted without objection, marked Defendant's Exhibit No. 5, and made a part hereof.

Q. I now hand you Defendant's Exhibits Number 3, 4 and 5 and ask you to explain to the jury the condition of the plaintiff's right shoulder and right clavicle and a comparison of his right shoulder with his left shoulder and left clavicle as it appeared on the 5th day of September, 1916, under this X-ray examination.

A. I will hold these two pictures up together, the pictures of the right and left shoulders, so you may compare the two and I will explain the different positions shown here. This is the clavicle, [202] this being the end which joins with the breast bone or sternum, and this being the end which joins with the point of the scapula or shoulder blade. This is the head of the long arm of the bone which fits into the socket here. This joint is what we call a non-movable joint, that is, in the movements of the arm there is a very slight, if any, motion in that joint—it is simply a connection between these two bones. This bone, the collar-bone or clavicle, is the bone which keeps the shoulder back in this position (indicating); as the picture shows here, this is absolutely normal as far as we can see, that is, the left shoulder.

(Testimony of Elmer C. Gross.)

And this is a picture of the right shoulder here, being the clavicle or collar-bone, this being the point of the shoulder blade or scapula, this being the head of the long bone of the arm. This picture does not show the inner side, as the trouble complained of is out in this region and the X-ray tube was focused on this part of the arm.

You will notice here a sharp tip on this bone which does not show in the picture of the normal bone. You will notice that this is practically straight across the surface while on this side is this sharp tipping up. That indicates that there has been a slight injury to the bone at this point; that certain ligaments which hold this bone in place and make the joint with this bone attachment across this spot, evidently the attachment of one of these ligaments has been jerked loose and raised that, but it has healed solid again, there being a perfect union there and allowed no separation of the joint, as you can see by comparing the two—the space between the two bones is identical as far as can be determined.

If there was a dislocation at this point, this bone invariably tips up, leaving a wide space here and leaving a prominence [203] on the point of the shoulder at this point. Here also in this bone, this new bone, at this point, does not show as distinctly as the old bone. You will notice beginning about here, there is a raise in the surface of the bone also here. That is rather hazy; that bone there is new bone. You will notice the structure of the old bone

(Testimony of Elmer C. Gross.)

is very definite and easy to make out, but the new bone, being not as thick, shows more hazy—there has been some enlargement of the bone for some reason at this point.

JUROR.—That is the right shoulder?

A. The right shoulder—whether there has been a fracture across the clavicle or collar-bone at that point or whether there has been a bruising of the bone, which has caused new bone to be thrown out, it is impossible to say from the picture. There is no deformity of the bone which would indicate any break in the continuity of the bone. A bruise over the bone at this point causing what we call an inflammation of the membrane that covers the bone will often cause new bone to be thrown out, giving a deformity which shows as it does in this picture; or a fracture across the bone at this point would also cause new bone to be thrown out, which would give the same appearance and from the picture, it cannot be told which condition is present.

But the alignment as shown in this picture—what we mean by the alignment is the position of the bone as a whole—has not been disturbed. If there had been a fracture, that displacement of the fragments was forward, that is, in a horizontal plane to this plate, and that would have shown very definitely. You will see by my two fingers in this position (indicating). If there had been a fracture and displacement of fragments and such displacement had been in this position, beyond, the plate being behind, of course one fragment would be taken through

(Testimony of Elmer C. Gross.)

[204] the other, but the density of the bone would be so much greater through those two portions, that that would show very definitely and show a line of demarkation at the end of the bone on this side and the end of the bone on this side. Of course new bone would be thrown out if a union had taken place, new bone would be thrown out at the end, but there is a definite difference in the appearance of new bone as taken by the X-ray picture and the appearance of the old bone. It is very like the joint of a pipe, the end of the old pipe would show very definitely. Therefore, I think I can say very positively that there has been no appreciable overlapping. Of course if the break had been diagonal, there might be a slight shoving up, which would leave this thin bone to overlap a very small amount and you might not be able to detect it right at the point, but if there was any appreciable overlapping, that would show very definitely in the density of the bone at that point. I think that is as much as I can show with the X-ray. There is quite a definite enlargement at this point, as can be made out, not only by the X-ray picture, but can be felt.

Q. From your experience in taking X-ray pictures of human bones, state if you are able to definitely ascertain from the picture where new bone and old bone appear in the picture.

A. Yes, I think so.

Q. Are you from this X-ray photograph you have taken able to definitely ascertain if there is any considerable overlapping at the union of the right clav-

(Testimony of Elmer C. Gross.)

icle of the plaintiff? A. I am.

Q. What is your opinion as to whether there is any overlapping at the union of the right clavicle or otherwise?

A. My opinion is that there is no overlapping.
[205]

Q. Now, how do you account for the slight increase in the thickness of the right clavicle over the normal thickness at the point where this enlargement appears?

A. There is new bone been thrown out as shows by the picture at this point. Whether that is due to a fracture or as I explained, to this injury to the bone, there is new bone been thrown out, making the collar-bone larger at that point, making a definite enlargement that you can feel.

Q. That enlargement you say might have been occasioned by a bruise of the bone, without there actually being a fracture? A. It might.

Q. Now, assuming, that there was a fracture at this particular point of the right clavicle of the plaintiff and it had been as perfectly joined together, or the union of the bones had been as perfect, as human skill is ordinarily able to accomplish, would it leave an enlargement at that place?

A. It would.

Q. Explain how that enlargement occurs—what is the cause of it?

A. The cause of the enlargement is throwing out of new bone. Whenever a bone is fractured and

(Testimony of Elmer C. Gross.)

the ends of that bone are brought together, within a very short period new bone begins to form, not only the space at the end of the bone, but it is thrown out around the break, because there is always more or less injury around the ends of the bone besides the injury directly on the ends, and there is always a rim of new bone thrown out around the break—very much like the soldering of a pipe.

Q. This new bone being thrown out is nature's way to protect the union of a broken bone?

A. Yes, sir.

Q. It is through this new bone being thrown out that the union is created? [206] A. Yes, sir.

Q. Now, after your physical examination of the plaintiff and your X-ray examination of the plaintiff on September 5, 1916, what is your opinion of the condition of this plaintiff as to whether the plaintiff is permanently injured in his right shoulder or right clavicle at this time, or at the time you made the examination?

A. My opinion is that he was not.

Q. Is there anything that would cause him any disability in the use of his right arm or right shoulder by reason of the enlargement which you discovered upon his right clavicle?

A. I can see no reason whatever for a disability.

Q. Is it possible for any disability to arise from that union or enlargement of the right clavicle which you have explained to the jury?

A. It is a pretty hard thing to say what is possible, but I can see no reason whatever for a dis-

(Testimony of Elmer C. Gross.)

ability arising from such a condition as the collar-bone shows.

Q. Did you find from your examination any defect of his right shoulder or right clavicle that in your opinion in any manner limits the motion of his right arm, from your examination at that time?

A. I did not.

Q. After this examination was completed, describe to the jury how the plaintiff used his arms in replacing his clothing on the upper part of his body.

A. The patient was allowed to dress himself unassisted after the examination and in putting on his undershirt, he was able to throw the arms up in this position (indicating) with no apparent evidence of any trouble or pain. [207]

Q. He threw his arms in a perpendicular position up over his head in order to pull his undershirt on?

A. He did.

Q. Did he complain at that time that he was suffering any pain by raising his right arm to that extent? A. He made no complaint whatever.

Q. Did he appear to flinch or indicate in any manner that he was suffering any pain by raising his right arm over his head in that way?

A. No, he did not.

Q. Now, after this examination was completed, did you recommend any treatment for the plaintiff in case he was really suffering pain in his right shoulder?

Mr. RITCHIE.—We object to that as irrelevant.

(Testimony of Elmer C. Gross.)

Objection overruled; plaintiff allowed an exception.

A. He complained of soreness, as I say, over the shoulder and—

Q. Just a moment. Where did he locate that soreness?

A. He located the soreness at this point (indicating).

Q. Did he locate any soreness at the point where the clavicle appeared to have a union or fracture?

A. None whatever; no soreness or tenderness or pain.

Q. How far in inches from the clavicle or from the outer end of the clavicle did he indicate where the pain was?

A. The joint of the clavicle is about in this position (indicating), and the indicated point was on the tip of the shoulder; I should say it was an inch and a half from the end of the clavicle.

Q. Are there any ligaments or muscles or nerves leading from the clavicle that would cause pain at the point of his shoulder, owing to any dislocation of the clavicle? A. I think not. [208]

Q. What is your opinion or what was your opinion on the 5th day of September, 1916, when you made this examination, as to whether or not the plaintiff at that time had the full normal strength of his right arm and shoulder?

A. My opinion at that time was that he had.

Q. Did you make any statement or express your

(Testimony of Elmer C. Gross.)

opinion to the plaintiff after you made this examination as to his condition?

A. I told him frankly that I could find no cause for any trouble there; he insisted that there was pain there.

Q. Pain on the top on his right shoulder?

A. Yes; and I told him if there was pain there that it seemed to be in the muscle, from what he indicated to me, and that that could be relieved by massage and application of liniments.

Q. Did you propose to him at that time to give him such treatment? A. I did.

Q. And what was his attitude regarding it?

A. He refused to accept any treatment.

Q. You were fully equipped at the hospital at that time to take proper care of him and give him that treatment, were you?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Objection overruled; plaintiff allowed an exception.

A. I was.

Q. And he refused? A. Yes, sir, he did.

Q. Did you make a subsequent examination of the plaintiff? A. I did.

Q. When did you make that examination and who were present at the time?

A. I was present at an examination made with Doctor Boyle, Doctor Winans and Doctor Newlove from the Post—I believe that examination was day before yesterday. [209]

(Testimony of Elmer C. Gross.)

Q. In Doctor Boyle's office?

A. In Doctor Boyle's office.

Q. Explain to the jury how that examination proceeded and what was done.

A. I don't know that all the men present made the same examination.

Q. Who conducted the examination? Was the examination conducted by one doctor and the others watching?

A. Part of it was and we each made whatever examination we chose to make. The patient was made to go through practically the same exercises which I have described.

Q. He was first stripped to the waist?

A. He was first stripped to the waist; yes.

Q. And went through the same exercises that you described you put him through on your examination at Ellamar on the 5th day of September, 1916?

A. He did.

Q. Did he experience any difficulty in going through those exercises?

A. He complained of pain.

Q. When?

A. On raising the arm and putting the arm in this position (indicating) and putting the arm up on the shoulder here.

Q. In your examination at Ellamar, he didn't complain of putting his right hand on his left shoulder, with his arm across his breast, did he?

Mr. RITCHIE.—We object to the question as leading.

(Testimony of Elmer C. Gross.)

Objection sustained. Defendant excepts.

Q. Doctor Gross, state to the jury whether or not in the examination at Ellamar on the 5th day of September, 1916, the plaintiff complained of any pain at the time you required him to put his [210] right hand upon his left shoulder, with his arm *acrossed* his breast?

A. He made no complaint of pain in performing that motion.

Q. What were the only motions at which he made a complaint as to causing him pain?

A. The motions which required him to raise his arm in this position (indicating).

Q. Describe what you mean by that position.

A. When I asked him to elevate the right arm in this position, he complained of pain at this point, in the muscle.

Q. On the examination held in Doctor Boyle's office the day before yesterday, or last Wednesday, what motions did he complain of causing him pain?

A. He complained of practically all the motions during the first part of the examination—he complained of practically all the motions that he was asked to make with the arm.

Q. Did you take his right arm and move it in any position? A. I did.

Q. Did you feel any resistance when you attempted to move his right hand to the point of his left shoulder?

A. There was resistance in the arm to the motion.

(Testimony of Elmer C. Gross.)

Q. What portion of the arm did this resistance appear to be in?

A. The resistance apparently came from the elbow joint. In putting the arm up this way, the resistance was apparently in the part of the arm here (indicating).

Q. Is it possible to ascertain from the involuntary contraction of the muscles in the region of a point where pain occurs, if there is pain there?

A. If there is any extensive pain, there is practically always a contracted state of the muscles, what we call rigidity, which can be definitely felt; that is an action on the part of [211] muscles to protect the part which is being irritated.

Q. At the time you moved the plaintiff's right hand to his left shoulder, did you have your other hand in the region of his clavicle, so as to ascertain if the pain really originated there? A. I did.

Q. And what were the results you found there?

A. I found no rigidity in the muscles in the region of the complained trouble.

Q. Was there an X-ray photograph taken at the time you made this examination last Wednesday?

A. There was.

Q. Have you examined that X-ray? A. I did.

Q. Is there anything from that X-ray that you could further explain to the jury the condition of his right clavicle other than you have explained by Defendant's Exhibits 3, 4 and 5?

A. The picture was not a good one and didn't show very much—it shows the bones and that is about all.

(Testimony of Elmer C. Gross.)

Q. What is your opinion—in case there was at one time a fracture of the plaintiff's right clavicle, which caused separation—what is your opinion as to whether the union of that bone is good or bad?

A. My opinion is that the union is good.

Q. What would you say, from your experience in treating cases of a fractured clavicle, whether or not the union as you found it from your various examinations, was as good as is ordinarily obtained in such cases? A. I would say it is as good.

Q. In your opinion, assuming that there was a fracture of the right clavicle last January, could there be, by any ordinary surgical [212] care, a better union of that bone obtained than you find there in its present condition?

A. I don't see that anything whatever could be accomplished by changing the bone—the alignment is perfect as far as I can tell, that is, the alignment of the bone itself.

Q. Then in your opinion that is as good a union as is ordinarily obtained in cases of fractured clavicle? A. Yes, sir.

Q. What difference did you discover as to the length, the relative lengths of the right and left clavicle of the plaintiff in this examination?

A. The right clavicle was a quarter of an inch according to my measurement shorter than the left.

Q. Would that of itself cause any disability?

A. No, I think not.

Q. What would be the result as to the position of the right shoulder if the shortening of the right clav-

(Testimony of Elmer C. Gross.)

icle is caused by this union of the bone—would it in any manner partially disable the shoulder or arm?

A. There might be sufficient shortening that there would be a dropping forward of the shoulder, resulting in a more or less extensive deformity—it might cause disability or might not.

Q. In your examination of the right and left shoulder, state whether or not the position of the right shoulder is normal or otherwise?

A. I could detect no difference in the two shoulders except for the enlargement.

Q. The only difference then that you detected was a slight enlargement of the right clavicle?

A. Yes, sir.

Q. At that particular point of the clavicle is there a natural [213] prominence of the bone, at that point? A. There is.

Q. To what extent?

A. The bone makes a large curve as it extends back toward the shoulder and then there is a sort of depression and a slight enlargement and then a backward extension towards the joint.

Q. Can you state to what extent this enlargement of the right clavicle is different from the normal clavicle at that point?

A. That is pretty hard to say because the size of the clavicles varies. Sometimes the right is larger than the left and sometimes the left is larger than the right, and it is impossible to say just how much of the enlargement on the one or the other side is due to an abnormality and how much was natural

(Testimony of Elmer C. Gross.)

there, but there is quite an enlargement there, I should say perhaps nearly half an inch of new bone, that is, an enlargement due to that new bone.

Q. That is the ordinary enlargement, is it, where a bone unites?

A. The amount of enlargement, the amount of new bone thrown out, varies greatly—it is not the same in any two cases.

Q. Would you say that the plaintiff's clavicle at this time, plaintiff's right clavicle, is in any manner deformed to any extent that would impair his ability to use his right arm or shoulder?

A. I would say in my opinion it was not.

Q. There has been more or less testimony introduced relative to the advisability of having an operation performed on the plaintiff's right clavicle. What is your opinion, as an experienced physician and surgeon, as to whether or not such a thing would be in any manner necessary or desirable to have done?

A. I can see no reason whatever to indicate an operation.

Q. Can you see any reason or any manner of performing an operation [214] that would make the union of the right clavicle at this particular point better than it now is? A. No, I cannot.

Q. Now, in making these two examinations, one on the 5th day of September, 1916, and one on last Wednesday, did you discover any tenderness in the region of the plaintiff's right clavicle?

(Testimony of Elmer C. Gross.)

A. I found no tenderness whatever—there was none complained of.

Q. If there was any defect in this clavicle would it or would it not cause pain in the region of the clavicle?

A. A defect might cause pain or it might not.

Q. If there was anything connected with the union of the right clavicle that would disable the plaintiff's right arm or shoulder, would there be pain in the region of the clavicle?

A. I would certainly expect to find pain at the seat of the cause of the trouble.

Q. And would you find tenderness there under those conditions too?

A. You would very likely find tenderness there.

Q. Did you discover any tenderness at that point in either of your examinations?

A. None whatever.

Q. Did the patient at either of the examinations complain of any pain or tenderness at the point, about the right clavicle? A. No, he did not.

Q. Are there other causes, other than the result of this injury, which might cause the plaintiff some difficulty in extending his right arm in a perpendicular position?

A. A rheumatic condition in the muscles about the shoulder joint very often causes pain in the movements to elevate the arm.

Q. Have you examined the X-ray photograph taken by Doctor Chase of Cordova, which is Plaintiff's Exhibit "B"—did you examine that [215]

(Testimony of Elmer C. Gross.)

photograph? A. I have.

Q. Does that photograph show any dislocation of the right clavicle? A. None whatever.

Q. Will you take that photograph and explain to the jury why the photograph does not show any dislocation of the right clavicle?

A. I pointed this out on the other pictures—the comparison with the other shoulder. This is the joint of the clavicle or collar bone with the point of the shoulder blade or scapula. This space as you see between here and the junction of the joint in the actual shoulder is not a space although it shows to be in the picture; the ends of the bone which make up the joint are covered by cartilage—the cartilage is the smooth shiny substance on the end of the bone which makes a smooth surface in the joint. That in the X-ray picture is transparent, it does not show at all in the photograph—that accounts for the space between these two points. In actual fact there is no space between there, the two ends knit together, but that is taken up by the cartilage and if there was a dislocation, as I said before, that end of the bone would be elevated with a characteristic deformity there, a characteristic prominence or deformity.

Q. Is there any explanation you care to make of the X-ray picture taken by Doctor Boyle and introduced in evidence? Taken by Doctor Boyle last Wednesday at the time of this examination you have testified to?

A. I think not—both of these pictures show a little more clearly than the other and the condition is prac-

(Testimony of Elmer C. Gross.)

tically the same—I don't see any change in it.

Q. What would be the nature of a fractured clavicle that would [216] warrant an operation?

A. An ununited fracture, with callous over the ends of the bone, would justify an operation to remove the callous from the end of the bone and freshen it, so when it was brought into proper position it would unite. With callous over the end of a fractured bone, even though they are brought into good position, there would be no union; if the bone has been out of position and allowed to callous over the ends, it is impossible to get a union until those ends are freshened up and brought into that position (indicating). If there is a shattering of the collar-bone, broken into pieces, so it is impossible to keep the bones in apposition owing to the position of the pieces, it is sometimes necessary to wire or splint those pieces to keep them in apposition to get a healing.

Q. But in an ordinary clean break an operation is never performed?

A. No, not until healing fails to take place.

Q. I believe you have already testified to the fact that the union in this bone, if there was a union, was as good as ordinarily is obtained in the case of a fractured clavicle? A. Yes, sir.

Q. You were present in the courtroom yesterday, were you not, when Doctor Boyle testified and made certain explanations of the plaintiff's shoulders?

A. I was.

Q. Will you at this time make a demonstration of

(Testimony of Elmer C. Gross.)

the plaintiff's shoulders to the jury for the purpose of explaining your theory of the position of his clavicle? A. I will.

Mr. DONOHOE.—We ask that the plaintiff come forward and take off his shirt. [217]

The COURT.—Very well.

(Plaintiff does so.)

The WITNESS.—As pointed out to you yesterday, here is the deformity spoken of, right at this point. In passing your finger along the collar-bone here, you come to a prominence which is about the junction of the middle and outer third of the clavicle. We make these divisions in order to localize the point, and this enlargement extends back to this point (indicating). If you notice there, there is a similar depression on the other side, not so extensive as on this, owing to the enlargement of the bone, but the natural clavicle takes a dip back at this point and then just beyond that is a point of prominence. This enlargement here comes right at the position of the natural prominence, but it is much more prominent as can be seen as well as felt, on this side. That is due to the outgrowth of new bone as shown by the X-ray picture. In taking the two clavicles between my fingers at the same position, you will notice that there is probably a slight difference on the two sides, this being a little wider. That is very natural with the outgrowth of new bone there. That cannot be due to overlapping as was pointed out, because the X-ray pictures taken in this position, the plate being behind, being a horizontal plane of this, if this

(Testimony of Elmer C. Gross.)

greater width here was due to overlapping, it would be this position which would definitely show in the X-ray picture to any eye. In my opinion the overlapping in the other position shows just as clearly but it is a matter of interpretation of the density rather than to see the actual offset of the bones. As a matter of fact there is not a very much greater width there but it is perceptible in the two sides. When you feel behind [218] the collar-bone, you can feel the line of the collar-bone very definitely—there is very little difference that I can make out in the two. It is a very slight enlargement at this point which is natural, as the bone is thrown out all along the collar-bone, but the general alignment, even to the feel, is the same on the two sides. You can see the same depression on the two sides, except this, owing to the enlargement of the bone here, is greater on that side.

Mr. RITCHIE.—May I ask the witness a few questions at this time?

The COURT.—Yes.

(By Mr. RITCHIE.)

Q. Doctor, I will ask you if in passing your finger right along here on the summit or apex or upper line of the collar-bone, on the left side, if it is not practically even or smooth all the way while on this side, whether there is at one point a depression in the upper part of it?

A. Yes, as I stated before, there is an enlargement.

Q. Isn't this almost straight across there except this is gradually raising at the outer end while here

(Testimony of Elmer C. Gross.)

on the right shoulder there is a sudden depression which can be felt, isn't that true?

A. That is very true. It is due to the elevation of the bone here—you go up and naturally have to come down again when you get over the depression.

Q. You see where my two fingers are—is that near the outer third?

A. Not in the same position.

Q. Isn't there a marked depression here where my right finger is, on the right shoulder? A. Yes.

Q. And scarcely a perceptible depression where the left is? A. Yes, that is true. [219]

Q. Is that natural, or was it caused by whatever injury was received?

A. That is due to the elevation of the bone at this point.

Q. Is that one of the results of the injury?

A. Yes, it is the result of the outgrowth of bone at this point.

Q. There is a little depression here in the collar-bone—

A. There isn't a depression in the collar-bone itself but a depression behind the enlargement. If the enlargement wasn't there, you wouldn't notice the depression.

Q. This is not so much a depression as the elevation of new bone? A. Yes, sir.

Q. That is what causes the apparent depression?

A. Yes, sir.

Q. But the bone is not natural—it is not a natural original formation?

(Testimony of Elmer C. Gross.)

A. This enlargement is not.

Mr. RITCHIE.—That is all at this time.

(Examination by Mr. DONOHUE—Continued.)

JUROR.—Will you have the gentleman go through those exercises, the same as the doctor showed us he went through in his examination?

(No objection by counsel.)

By Doctor GROSS.—Put the left hand on the right shoulder.

(Plaintiff does so.)

Now put this hand on the other shoulder, put it clear up on top as far as you can.

(Plaintiff does so.)

Now put the other one up again. (Does so.) Now put this one up as far back as you can. (Does so.) Now put the other one up as [220] far as you can, up on top of your shoulder. (Does so.) Now let me take it and put it up; let your muscles go perfectly loose. Where does it hurt you?

The PLAINTIFF.—Here (indicating).

Doctor GROSS.—Now put your hands out in this position right straight in front of you towards me. (Does so.) Now let me take them—where does that hurt you?

Mr. RITCHIE.—I will ask you gentlemen of the jury to note the position of the back when the doctor draws the arms out.

Doctor GROSS.—Stand up straight. Now put your hands back in this position, turning your hands out like this the way I do here. (Does so.) Now let me take them—let your muscles go perfectly loose.

(Testimony of Elmer C. Gross.)

This arm is all right, isn't it? Stand straight and bring your arm right back—where does that hurt you?

PLAINTIFF.—Right here (indicating).

Doctor GROSS.—If it hurts you a little, just stand it for a little bit; let your arm go loose. There is no trouble in this place, is there? Let this joint go loose, like you did the other day. You notice the resistance in this joint. Rest your arm up like this—Where does that hurt you?

PLAINTIFF.—Here (indicating).

Doctor GROSS.—Raise your arms up in this position, up as high as you can. (Does so.) Put the other one right up. (Does so.) Let your arms go perfectly loose, let your elbow joint go loose at least. Where does it hurt you?

PLAINTIFF.—Right here (indicating).

Mr. RITCHIE.—Now put both your arms up suddenly like this?

Doctor GROSS.—It doesn't hurt you to go up that far?

PLAINTIFF.—Not now.

The COURT.—Will you ask him to leave his left shoulder in its [221] normal position and see if he can raise his right shoulder without raising the arm?

JUROR.—Throw your arm up that way (indicating). (Does so.)

Doctor GROSS.—Raise the right shoulder up this way (indicating).

(Plaintiff does so.)

(Testimony of Elmer C. Gross.)

Mr. RITCHIE.—Will you have him turn with his back to the jury and go through the same motion, raising the right shoulder?

(Plaintiff does so.)

(Plaintiff excused.)

(By Mr. DONOHOE.)

Q. Doctor Gross, you heard the testimony of Doctor Boyle in which he spoke of observing the plaintiff in his attitude and carriage on the streets of Valdez, at various times? A. Yes.

Q. Have you the past few days, since you came up from Ellamar, had occasion to also observe the plaintiff while upon the streets of Valdez and the manner in which he carried his right arm? A. I have.

Q. State what you noticed in that regard.

A. I noticed the plaintiff, the morning after the fire, in walking out from the sidewalk to the centre of the street, over debris, as he stepped over, in climbing over this debris, he threw the right arm up quite freely, about I should say in this position (indicating). In stepping up in this way he threw the arm up in this position.

Q. Did he seem to have any difficulty at that time?

A. He didn't seem to have any trouble.

Mr. DONOHOE.—That is all. [222]

Cross-examination.

(By Mr. RITCHIE.)

Q. Is it your opinion or otherwise that there has been some injury to that bone within the last year or two?

A. I couldn't say how long ago; it is my opinion

(Testimony of Elmer C. Gross.)

there has been an injury to the bone,—I couldn't say when the injury was.

Q. There is nothing about the present condition of it which would make you feel warranted in stating that it was within a definite time?

A. No, there is nothing.

Q. It might have been one year or five years?

A. Yes, sir.

Q. But in your opinion there has been an injury of some kind? A. Yes, sir.

Q. How would you describe that injury—in your opinion, was it a fracture or simply a bruise?

A. I can't say positively whether the outgrowth of new bone is due to a fracture or whether as I said before it was due to a bruise causing inflammation of the membrane that covers the bone, causing an outgrowth of new bone.

Q. A severe bruise to the periosteum sometimes causes the outgrowth of new bone, does it?

A. Yes, it does.

Q. Does that often occur in the absence of a fracture?

A. Quite often, with a bruise of the bone and resulting inflammation of the periosteum.

Q. A slight fracture sometimes grows together almost of itself, just by good luck, with a little attention? A. Yes, sir.

Q. It is true, is it not, and within the knowledge, the very extensive knowledge of the medical profession, where men have had [223] severe fractures of bone, out in remote camps, mining camps or

(Testimony of Elmer C. Gross.)

cattle camps, where there was no doctor within a hundred miles, and in a crude way they have set the bone the best they could and in a healthy man it would grow together again?

A. It happens sometimes.

Q. It will grow together sometimes in such a way as to cause a permanent disability, a limp in the leg?

A. Yes, sir.

Q. And yet the bone would be, even though there was some deformity, in a perfectly healthy condition? A. Yes, that is possible.

Q. So there would be no future difficulty except the deformity and any consequent stiffness that might be caused? A. That is very often true; yes.

Q. Now, in this case, you have told Mr. Donohoe that you think the union of whatever fracture there was, if there was one, has been perfect except for the growth of new bone—am I stating it correctly?

A. I didn't say the union was perfect—I said the alignment of the bone. Of course there is the deformity, which is not a perfection, but the alignment is perfect.

Q. Do you consider that bone as strong now as it ever was, that collar-bone? A. Yes.

Q. And just as useful? A. Yes, sir.

Q. Do you think that the thickening of the bone by the outgrowth of new bone has in any way caused a permanent stiffening?

A. I see no reason why it should cause any.

Q. A permanent stiffening of the shoulder, I mean?

(Testimony of Elmer C. Gross.)

A. No, I see no reason why it should cause that.
[224]

Q. Do you think the shoulder is as flexible as it was before? A. I think it is.

Q. I mean at this time—that he could, if he would, use it just as easily as he could before this injury?

A. I do.

Q. Then you think that his apparent reluctance to raise his arms and to use his shoulder as he does, his left shoulder, is entirely malingering?

A. It is my opinion that that is voluntary.

Q. Entirely voluntary?

A. Entirely voluntary.

Q. You spoke a while ago about the flinching or stiffening of the muscles when pain is caused always being in the immediate locality, as I understand it?

A. I didn't say it was always in that locality—I say there is always a rigidity of the muscles at the source of irritation.

Q. Isn't there also a rigidity in all the connecting members and all the muscles, especially where the nerve centres are running straight through?

A. There is a voluntary rigidity of other muscles to protect them.

Q. Suppose a strong man seizes my right shoulder and gives it a violent twist that causes me great pain, wouldn't my whole arm stiffen, particularly down to the elbow, involuntarily? A. It might.

Q. If I were standing erect and a man struck me a violent blow on the leg above the knee, wouldn't I stiffen clear to my foot and straighten my leg out

(Testimony of Elmer C. Gross.)

involuntarily? A. You might.

Q. Wouldn't I certainly do it?

A. That is hard to say—it would depend upon the sort of injury. [225]

Q. Now, on this question of the thickening of the bone by the growth of new bone—where there is a considerable thickening following the growing together after a fracture—doesn't that very often result in the stiffening of the member, of the limb or whatever it is?

A. It does if it comes within a joint or if it comes where muscles or ligaments play over the bone.

Q. Isn't it almost the invariable rule, where there has been a violent injury to a bone in any part of the body, particularly of the limbs—and by limbs I include shoulder, although that is probably not accurate,—isn't it true that wherever there has been a serious injury to the bone that in that locality the member of the body is always stiffer, less flexible, in use?

A. Not unless it comes within the joint surface or comes where muscles or ligaments are either attached or play over the bone.

Q. Now, for example—a few years ago in an injury case which we had at Cordova, Doctor Council testifying for the Kennecott Mines Company to an injury to the wrist, what he called and what the other doctors called an infracted fracture—the man had fallen that way (indicating) and the bone was not properly set, as was admitted, in the first place, and Doctor Council had gone over it afterwards.

(Testimony of Elmer C. Gross.)

He admitted in his testimony that while in his opinion the wrist was just as strong, had become just as strong, for lifting purposes, it would never be flexible—don't you think that the same thing is true in this shoulder?

A. Certainly not—there is no comparison between the two places.

Q. Was he probably right when testifying that that bone had thickened as the result of this fracture and the cure of it, to the extent it was cured? [226]

A. Yes.

Q. Doesn't the thickening of the bone in this man's clavicle cause a less agile use of the bone?

A. No, it does not, for the reason that there are no muscles attached there and no ligaments that play over that point and I see no reason whatever for the enlargement of the bone at that point to cause any disability.

Q. You stated, if I understood you correctly, in answer to Mr. Donohoe's questions, that while you did not believe there was any permanent disability resulting from this injury, that you were not prepared to say with absolute certainty that such was the case?

A. I said in my opinion there was none.

Q. Would you assert positively that this man's shoulder is as good now and he would be just as strong in mining, have just as much use, both as to strength and flexibility, of that shoulder as he ever had?

A. As far as I know, I would say "Yes."

(Testimony of Elmer C. Gross.)

Q. You think there is no possibility of any permanent disability or impaired use

A. In my opinion there is not.

Q. Wasn't one of your answers to the effect that it might cause disability and might not?

A. I don't think so.

Q. On your direct examination, if you made that statement, do you now wish to withdraw it?

A. As I remember the way the question was put to me, could the injury to the clavicle cause a permanent disability or might it cause—or an injury about the shoulder I believe it was— and I said an injury might or it might not. [227]

Q. Mr. Donohoe put this question to you— Is the present condition of that shoulder as good as human skill could make it after such an injury as occurred there—that was about the question and if I understood you correctly, you answered “Yes?”

A. Yes.

Q. That is to say, you think that everything was done by Mrs. Tramontin that a skilled surgeon could have done—you say that the result is as good as could have been obtained?

A. I don't know what was done.

Q. You say the result was as good? A. Yes.

Q. You think if yourself or Doctor Willis had attended that shoulder the night the injury occurred, that it would be precisely in the condition now that it is?

A. I think I would be pretty well satisfied if it was.

Q. You don't think you could fix that shoulder

(Testimony of Elmer C. Gross.)

up better than it was done?

A. I don't think I could have got a better union if it was fractured.

Q. Do you think that it was a straight fracture, if there was one?

A. It is impossible for me to say that, I couldn't say definitely there was a fracture there and couldn't say what the character of it was if there was.

Q. You can't say now, either by the sense of touch or anything indicated by the X-ray whether it was a splintered or shattered fracture?

A. No, if it was a clean break I would expect to see quite a definite outline of the ends of the bone.

Q. Now, does a bone thicken by the growth of new bone more in the case of a shattered fracture or a clean one?

A. It depends on how freely new bone is thrown out. In a shattered [228] bone, if you have exposed surface,—you usually get greater enlargement the more surface is exposed; if the bone was shattered with all the raw surface inside, you would not get anything more than a clean break.

Q. Is there always a thickening of the bone after a fracture of any kind? A. Yes, sir.

Q. If a man was to break a bone in the forearm, a clean vertical break, crosswise, and that was set immediately or almost immediately by a skilled surgeon, would there be a thickening of the bone at the union?

A. You practically always get a rim, greater or less, at the point of fracture.

(Testimony of Elmer C. Gross.)

Q. Isn't the growth of new bone in this case much more than ordinary?

A. Not for fractures of the clavicle.

Q. Do you think in any case of a fracture of that kind you would find the same condition as we detected when we had our fingers on the plaintiff's shoulder, a depression and ridge on the inside of the clavicle?

A. Very much the same, because there is a natural depression where the bone turns back; if it was a straight bone, you wouldn't expect the depression to show in the same way when you went over the enlargement.

Q. That falling off of the shoulder from the elevated part is due wholly to the elevation of the bone and not to a depression?

A. To the elevation and the natural depression in the bone behind it.

Q. There is no unnatural depression there?

A. No, I think not.

Q. On this matter of overlapping—you think there is very little [229] overlapping there?

A. I think there is none.

Q. You think there is none?

A. There might be if there was a diagonal fracture,—it might be slipping up to a very small extent, but there is no appreciable extent of overlapping.

Q. There is no overlapping this way, on a horizontal plane, at all? A. No.

Q. There is no protrusion of one end of the bone past the other? A. No.

(Testimony of Elmer C. Gross.)

Q. No indication of that at all? A. No.

Q. And if there was any, would it show in the X-ray, taken anteriorly and posteriorly?

A. Yes, it would.

Q. It would show? A. Yes, sir.

Q. The X-ray shows lights and shadows according to the character of the bone, to some extent?

A. Yes.

Q. For instance, you explained to the jury a while ago that cartilage doesn't show at all in the X-ray?

A. Yes.

Q. If there is a great deal of salts in the bone that makes a darker shadow in the X-ray?

A. The calcium or lime in the bone is what gives it the appearance in an X-ray.

Q. And that is why an X-ray shows bones and doesn't show flesh? A. Yes, sir.

Q. And if there is a great deal of salts in the bone, it makes the X-ray darker? [230]

A. Yes, sir.

Q. And if the calcium is less, does it show darker?

A. It shows denser in the X-ray, not darker.

Q. This X-ray you four doctors took the other day is not a very good X-ray?

A. It was perfectly clear.

Q. You think it is not as good as the two you took at Ellamar?

A. I don't think it is as clear.

Q. Is that due to the fact that the machine was better or was the light or conditions better?

A. I don't know whether there is a difference in

(Testimony of Elmer C. Gross.)

the machines but that is a thing that happens to anybody, that you get a poor picture once in a while—you can't always say just why it is.

Q. It is due to conditions that even doctors do not understand?

A. Yes, you don't always get a good picture.

Q. But all these pictures in a general way show the outline?

A. As far as they are distinct, they show the same thing—there is no difference in the pictures.

Q. A bruise of a bone is simply an injury? That is— A bruise is only to the periosteum—if it reaches to the bone itself, why then it is in the nature of a fracture, is it not?

A. Well, no, not necessarily. Of course you can have an injury to the bone itself without a fracture, as well as the covering of the bone.

Q. A bruise on a bone would be an indentation, wouldn't it, something of that kind?

A. A bruise would, yes, but an injury to the bone—you might have a bump of the bone, causing injury, without a depression.

Q. But if it didn't leave any mark at all, you would hardly call it an injury? A. No. [231]

Q. This injury, whatever the plaintiff suffered, was undoubtedly the result of a violent blow or violent contact with an immovable object?

A. There seems to have been some impact there.

Q. It is about such an injury as you would expect from a man having his shoulder thrown violently against a rock wall?

(Testimony of Elmer C. Gross.)

A. It can come from a deceased condition, tuberculosis, syphilis and those sort of things, but I have no evidence of any such condition.

Q. As far as your observation goes, this man is perfectly normal, except what injury there is to the shoulder? A. Yes, sir.

Q. A very strong, healthy man?

A. Apparently so.

Q. There is no indication of tuberculosis of any impaired condition of the flesh? A. No.

Q. Do you think that that bone fracture or bruise, whatever it was, cured up entirely within a reasonable time? A. Yes, I do.

Q. Is there any difference in the man's condition as it was the 5th of September and as it was when you examined him three days ago—did you notice any difference in his condition?

A. I couldn't make out any.

Q. So far as you could tell by looking at him, your attempt to have him go through exercises and your sense of touch and what is shown by the X-ray, his condition is practically the same as it was in September?

A. The only difference is, in the examination to-day he complains of tenderness at this point (indicating) and never before [232] has he done that.

Mr. DONOHOE.—What point is that?

The WITNESS.—At the point of the deformity. Yesterday when Doctor Boyle was examining him, was the first time he localized pain at that point.

(Testimony of Elmer C. Gross.)

Q. Did any of you doctors ask him any questions in that examination? A. Yes, sir.

Q. Did you ask him whether he suffered pain?

A. Yes.

Q. And he didn't indicate any pain there at that time? A. No.

Q. Did all of you have him go through the same exercises he did this morning?

A. I did; I don't know whether all of them made him go through the same motions or not; they were all present when he went through them, though.

Q. Now, as to this operation. You gave, as I understand it, pretty nearly the same explanation as Doctor Winans does—that it is an operation which is only performed at times when there has been an improper setting of a broken bone and the ends of the bone being calloused over so it would be impossible to grow together except by being freshened or roughened?

A. Yes, and I would add a deceased condition of the bone sometimes requires it.

Q. If there was any gangrene of the flesh you might have to perform an operation, or something of that kind? A. Yes, sir.

Q. Is it possible that at the time he was examined by Doctor Winans and Doctor Dalton, which was some time between February and April of last year—is it possible that there was an unnatural [233] condition then which has become cured of itself?

A. There might have been a condition there which

(Testimony of Elmer C. Gross.)

is not present at the present time.

Q. Supposing there was a fracture of this clavicle on the 12th day of January, 1916, if it had been properly set, or almost perfectly set at that time, do you think the bone must have been thoroughly united and in its present condition by the first of March? A. Yes, sir.

Q. You think there would have been no change in it since that time? A. Not if it was a fracture.

Q. Do you think if the plaintiff wanted to do it that he could go through these exercises or similar ones, such as they put us through in a gymnasium, such as this (indicating)—he could go through these motions as easily and readily as I do, without any difficulty at all?

A. I think he could. I can't find any obstacle to the movement of the arm whatever, except voluntary resistance, that is what my opinion is.

Q. Then you think this voluntary resistance, as you call it, the flinching of the muscles at the time you brought the arms up is an attempt to show he was injured when he was not? A. I do.

Q. You think it is wholly a matter of malingering and you think the man has as free use of his arms and shoulders, both of them, as you have?

A. As near as I can tell, he has, yes.

Q. And he can use his right shoulder as easily as he can the left—as easily as you can?

A. Perhaps better, because I have rheumatism in mine.

Q. As well as any man that hasn't rheumatism?

(Testimony of Elmer C. Gross.)

You think he can [234] use both shoulders as easily as I can? A. Yes, sir.

Q. On this question of measuring the clavicle—the bone, of course, is rounded, something like this globe or shade? A. Something like that.

Q. And it is impossible to say, is it not, unless you would mark it as you mark a stick or wall, that in measuring it from time to time, that you start from the precise point you did before?

A. It is difficult to get it perfectly exact.

Q. You doctors know where the ends of the bone are, but in placing a tape on the rounded surface, you wouldn't say that any two of you would put it in identically the same place?

A. We take the same point, but the point on the bone is rounded, so there could be a variation there.

Q. If the bone is round, geometrically it has no point? A. No.

Q. So you could hardly be certain to place it, place the end of the tape, at exactly the same place?

A. Not within a very small distance.

Q. It is your opinion that his man has not suffered any pain for a good while?

A. I couldn't say he has not suffered pain, he undoubtedly did suffer pain at some time if he had an injury there, which he undoubtedly has.

Q. Since you have known him, you think he has not suffered pain at all?

A. Not as far as I can make out.

Q. And in going through these motions, he has simply been pretending when he said he suffered

(Testimony of Elmer C. Gross.)

pain—none of it is involuntary—is that your idea?

A. That is my idea. [235]

Q. You, of course, suffered no pain while you were putting him through those motions, and you don't think he suffered any more than you did?

A. I don't think he did.

(By Mr. DONOHOE.)

Q. You were present yesterday when Mrs. Tramontin was on the stand? A. Yes, I was.

Q. You observed the movements she testified to that Doctor Duckwall required the plaintiff to perform when he made an examination of him at Ellamar on the tenth day of February, 1916?

A. Yes, sir, I did.

Q. Will you state whether or not those motions, as she testified to them, were the proper motions to ascertain if the right clavicle was broken or there was a separation or any injury to the right shoulder?

A. They were.

Q. I wish you would explain to the jury the function of the clavicle in the human body, if you can—what is it for?

A. The function of the clavicle is sort of a brace between the breast-bone and the point of the shoulder, to keep the shoulder back. If that is broken or taken away, there would be a dropping forward of the shoulder. The function of the clavicle is to keep the shoulder back in this position (indicating).

Q. Now, the clavicle as a bone has no rotary motion? A. No.

Q. Distinguish those kind of bones from other

(Testimony of Elmer C. Gross.)

bones in the human body, if you can.

A. A bone of that sort has a free joint that allows a motion— [236] there are different kinds of joints; there may a motion in one direction, a hinge joint, but a rotary motion would be a joint that would work in any direction, like a shoulder joint.

Q. Would there be anything known to medical science or surgery to indicate that a slight shortening of the clavicle would in any manner interfere with the performance of its natural functions?

A. I can see no reason why it should.

Q. Now, the only perceptible effect of the shortening of the right clavicle would be a slight drooping of the right shoulder forward? A. Yes.

Q. If the shortening was sufficient? A. Yes.

Q. Have you, in your examination of this plaintiff, discovered any drooping forward of his right shoulder? A. No.

(By Mr. RITCHIE.)

Q. In a right-handed man is the right clavicle longer or shorter or precisely the same length usually as the left clavicle?

A. I don't think the fact that he is right-handed has any direct effect upon it. Sometimes one clavicle is slightly longer than the other, it might be either the left or right that is longer. I think as a rule where there is a difference in the size, the right clavicle is usually a little larger than the left.

Q. Does that make its length, as you measure it, a little bit longer? A. It might and might not.

Q. What is your opinion of that statement in

(Testimony of Elmer C. Gross.)

Gray's Anatomy which I had Doctor Boyle read yesterday that in right-handed persons [237] the right clavicle is usually slightly longer than the left—do you think that is true?

A. That may be true.

Q. Then in this case, if the right clavicle at the present time is somewhat shorter than the left, it is not a normal condition in a right-handed man?

A. The statement in the anatomy does not say the right is always longer—a matter of a quarter or half an inch would not have a great effect one way or the other.

Q. I asked you if that is a normal condition for a right-handed man? A. Yes, it is normal.

Saturday, January 5, 1917—Afternoon Session.

Continuation of Recross-examination of Doctor Gross:

(By Mr. RITCHIE.)

Q. Is this alleged injury in the plaintiff's shoulder near the seat of any very sensitive nerves?

A. There is a nerve that runs underneath the clavicle, not particularly in close proximity to this.

Q. Do you think a break, if one occurred there, would have any effect upon the nerves in that immediate locality?

A. Not unless there was a dipping down of the point of the clavicle that would puncture into the tissues underneath.

Q. That would either puncture or produce pressure? A. Yes, sir.

Q. Do you think there is anything about the

(Testimony of Elmer C. Gross.)

growth of new bone or the present condition of that bone that would cause pressure on any of the sensitive nerves?

A. If you had such pressure on the nerve there would be constant pain to impair its function and evidence of that pressure locally. [238]

Q. Do you think the nervous functions are in any way affected by any injury received?

A. I think not—there is no evidence of it whatever.

Q. You think the pain he complains of couldn't arise from any pressure on the nerves?

A. The pain of pressure on the nerve would be constant.

Q. Wouldn't it be exaggerated by motion of the shoulder or arm?

A. If the nerve was severed, for instance, or partially severed, it might result in the paralysis of certain muscles.

(By Mr. DONOHUE.)

Q. Did you discover anything from your examination of the plaintiff, either when you examined him on the 5th day of September, at Ellamar, or when you examined him last Wednesday, that indicated to you that there was any pressure on the nerves?

A. No evidence whatever of any such pressure.

Q. Did the plaintiff in any of those examinations complain to you of a constant pain in the region of the clavicle? A. He did not.

Q. Did he show any indication of any kind of any

(Testimony of Elmer C. Gross.)

constant pain in the region of the clavicle?

A. None whatever.

Witness excused. [239]

Testimony of George Newlove, for Defendant.

GEORGE NEWLOVE, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. George Newlove.

Q. What is your profession?

A. I am surgeon at Fort Liscum, in the employ of the United States Army.

Q. From what school of medicine and surgery did you graduate?

A. The Medical Chirurgical College, Philadelphia.

Q. What year? A. In 1898.

Q. Were you required to take a course in the army school of medicine also? A. At that time, no.

Q. When did you become a surgeon in the United States Army first? A. The latter part of 1898.

Q. Were you a surgeon in the United States Army at the time of the Spanish war? A. No, sir.

Q. Have you in your experience as a surgeon had occasion to treat patients suffering from various personal injuries? A. Yes, sir.

Q. To what extent has that experience been, if any?

A. It depends on the post I have served; I have had a good deal of experience in cavalry and artillery posts. Of course in the service we are sent to

(Testimony of George Newlove.)

various stations. In infantry stations we don't get quite as much experience in fractures and dislocations as we do in cavalry and artillery, but I think in the length of time I have been in the service, I have had the average [240] experience of a general surgeon in the service.

Q. And that experience is quite extensive, is it?

A. I think so.

Q. Have you had occasion to treat and examine patients suffering from fractured clavicles or dislocation in the bones of the shoulder? A. I have.

Q. To what extent has that experience been?

A. I couldn't tell you the number of cases—I have had quite a number.

Q. Can you make any estimate of about the number of cases you have had in connection with fractured or dislocated clavicles?

A. Well, I wouldn't like to state, but in one post I served at, Fort Sill, I had fifteen dislocations and three fractured clavicles in one month—that was due to the number of recruits that had recently joined.

Q. From your experience as a physician and surgeon, are you at this time able to examine a patient and determine the condition of his clavicle?

A. I think so.

Q. Did you on last Wednesday, the third day of January, 1917, make an examination of the plaintiff, Tony Possus, in the presence of Doctor Boyle, Doctor Winans and Doctor Gross? A. I did.

Q. Just state to the jury and Court what the condition of his right clavicle was at the time you made

(Testimony of George Newlove.)

this examination. Before that, however,—how did you proceed with the examination of this plaintiff?

A. Well, I put him through the regular exercises that we usually do for recruits that are joining the service; that is, practically [241] the same exercises as Doctor Gross demonstrated to the jury.

Q. You were here in court this morning when Doctor Gross testified? A. Yes, sir.

Q. Did you carry on that examination by means of feeling and observing?

A. Yes; I spent about twenty minutes examining him there.

Q. State to the Court and jury what was the condition of his right clavicle at the time you made this examination.

A. Well, when I examined the man I found that about one inch, I should say, from the point where the clavicle articulates with the shoulder blade or scapula there was an undue prominence, and on careful examination I came to the opinion that there had been, either a severe contusion of that bone, which involved the periosteum and probably the bone itself, which caused an excess or enlargement or outgrowth of bone, or possibly there might have a fracture. I further ran my finger down to the end of the fixed portion of the clavicle, where it articulates with the shoulder blade, and found that it was firm and on the various manipulations that I went through with, I kept my hand firmly pressed on this portion of the shoulder, or the portion of the outer extremity where the clavicle articulates with

(Testimony of George Newlove.)

the scapula, and I could find no motion or any displacement or any what we call grating or crepitus, and I was firmly convinced then that the man had a very good union, a strong union.

Q. A very good union of the clavicle had it been fractured?

A. A very good union of the clavicle, had it been fractured, yes.

Q. Now, you found an enlargement of the clavicle at the point you described? A. Yes, sir. [242]

Q. Now, what might that enlargement be due to?

Mr. RITCHIE.—We object to that; he may state what he believes it to be due to.

Q. What do you believe to be the cause of that enlargement?

A. It might have been the result of an old fracture; it might have been the result of an apophysitis or it might have been the result of a periostitis, that is the inflammation of the bone itself or the covering of the bone.

Q. Now, assuming that originally there had been a fractured clavicle at this particular point, what have you to say as to what kind of a union was had of the bone?

A. I think it is a very good union, the average.

Q. What did you discover with regard to overlapping or otherwise?

A. Why, I was present when the part was examined, and I should say roughly that there was probably a quarter of an inch maybe of difference in the

(Testimony of George Newlove.)

two bones, and that the overlapping was not at all to any great extent.

Q. Not more than—

A. Not more than you would ordinarily find in the case of a united fracture.

Q. And from the condition you found there, what would you say in your opinion as to whether the plaintiff had received good care shortly after the accident that caused that fracture or otherwise?

A. Well, from the result, I should say, that he received very good care.

Q. You have had under observation numbers of cases of fractured clavicles, have you not?

A. Yes, sir, I have.

Q. Comparing the condition of this clavicle of the plaintiff at [243] the point of original fracture, if there was a fracture, what would you say as to the condition you there found, as to whether it was an average good union or otherwise?

A. I should say it was an average good union.

Q. Did you detect anything in connection with the union of this clavicle that would lead you to believe that there had been surgical neglect at the time the fracture occurred?

A. Well, from present appearances, it looks to me like a very satisfactory result.

Q. The plaintiff, in performing these manoeuvres or exercises which he was subjected to at this examination, on the 3d day of January, 1917—did he exhibit any pain or claim he was suffering any pain?

A. He claimed that nearly all the motions I had

(Testimony of George Newlove.)

him perform—he complained of pain, at the end of the shoulder.

Q. How far away was that from the original fracture of the clavicle, if there was one?

A. Well, the fracture was probably half an inch or more from where it articulates with the scapula, and I should say about half an inch or so.

Q. From the place where he located the pain?

A. It was right around the tip of the shoulder he complained of pain whenever I put him through any motion; he said he couldn't do it, it hurt him.

Q. Did you have occasion to take his right hand and place it upon his left shoulder? A. I did.

Q. And did you discover any resistance when you put his hand upon his shoulder?

A. I discovered no resistance at the seat of the old injury, but he resisted me at the elbow. [244]

Q. Assuming that he really was suffering pain in the region of the original injury, would you have been able to discover that from the rigidity of the muscles in that region? A. I think so.

Q. And did you discover anything that led you to believe that his resistance came from the seat of the original injury?

A. There was no resistance at the point of the original injury or no muscular resistance.

Q. It is a fact, is it not, that had there been pain in the region of the clavicle, the muscles would have become tense in that section of the body?

Mr. RITCHIE.—We object to that as leading.

(Testimony of George Newlove.)

Objection sustained; defendant allowed an exception.

Q. Doctor, had there been pain at the original seat of the injury, when you placed his right hand upon his left shoulder, would there have been any change in the muscles of that region from which you could ascertain whether there was pain there or not?

A. Well, that depends upon the seat of inflammation; if the man had acute pain, as soon as he moved that arm the muscles would have been thrown voluntarily into a state of contraction—it is simply nature's effort to protect an injured part.

Q. Did you discover anything of that kind in the region of the clavicle that would indicate to you whether there was pain there or not?

A. No, except the man said it hurt him when I placed the arm on his shoulder.

Q. Did you in the course of that examination observe the position of the right and left shoulder?

A. I did.

Q. Was the position of the right shoulder normal or otherwise? [245]

A. The conformation of both shoulders as it appeared to me were normal.

Q. If there had been a serious shortening of the right clavicle by reason of this union, would the right shoulder then be normal or otherwise?

A. The right shoulder would probably, in all probability, droop down and a little forward.

(Testimony of George Newlove.)

Q. What is the function of the clavicle in the human body?

A. Well, the clavicle and the head of the scapula form what is known as the shoulder girdle, and the clavicle acts as a sort of brace to keep the body erect, and it also is the only bony connection between the upper extremity and the trunk—it helps keep the arm in position.

Q. Then, I understand, in case there was any defect in the clavicle or any shortening of it, a material shortening of it, you could detect that from the position of the shoulder? A. I could.

Q. And did you find anything in the condition there to indicate there was a shortening of the clavicle?

A. No, only this examination, which showed that there was a slight difference, but that might happen in anyone. Sometimes the right clavicle is larger than the left and sometimes it is not; a good deal depends upon a man's vocation. If a man is a laborer sometimes one bone is enlarged, because the muscles on that side are developed to a greater extent than they are on the other.

Q. Now, you found a slight difference in the measurement of the right clavicle and the left clavicle, did you? A. I did, a slight difference.

Q. About what was that difference?

A. If I remember correctly, about a quarter of an inch. [246]

Q. From your examination of the plaintiff, did you discover any defect in his right clavicle or right

(Testimony of George Newlove.)

shoulder that would, in your opinion, permanently disable him? A. In my opinion, no.

Q. What is your opinion, from your examination, as to the plaintiff's ability at this time to use his arm as freely as an arm is ordinarily used, or an ordinary arm is used?

A. Well, I think the man could use it if he tried.

Q. Did you discover anything from your examination that would lead you to believe that owing to any defect in the plaintiff's right clavicle or right shoulder, it would prevent him from having his normal strength and use of his right arm and right shoulder? A. No.

Q. Doctor, you have observed patients, have you, from time to time, who had their right clavicles fractured and a union effected, and have observed as to whether or not the use of the right arm and shoulder would be impaired to any degree? A. I have.

Q. And what is your experience in regard to those observations?

A. As a general rule, in most cases, they recover entirely.

Q. About how long does it ordinarily take for a good healthy man, for his clavicle, when fractured, to reunite?

A. That depends a good deal upon the man's constitution—a good healthy man, I would say, would have a good strong bony union in three or four weeks, but of course the arm would still be weak and he would have to care for it for perhaps four

(Testimony of George Newlove.)

weeks or six weeks, maybe; he would have a good strong bony union there inside of three weeks.

Q. Since you examined the plaintiff on the third day of January [247] have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. RITCHIE.—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. DONOHOE.—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of the plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and the plaintiff, side by side, before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms.

After argument by counsel the motion to strike the answer was by the Court granted and the objection sustained. To which ruling of the court counsel for defendant was allowed an exception.

Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle, there was an overlap-

(Testimony of George Newlove.)

ping of the two ends of the bone?

Mr. RITCHIE.—We object to this question as to all similar questions on the ground that Doctor Newlove qualified as an expert on this and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something [248] similar has not resulted in a permanent injury would be simply making all cases stand as an exception. The objection was by the Court sustained; to which ruling of the Court counsel for defendant is allowed an exception.

Q. In the examination of this man, did you find an overlapping? A. Which man?

Q. I am speaking of the man you examined since you examined the plaintiff—In the examination of this man, did you discover that in the union of his right clavicle the ends of the bones overlapped half an inch?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff who had an overlapping of his right clavicle in effecting a union after a fracture?

Mr. RITCHIE.—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

Mr. DONOHOE.—That is all.

(Testimony of George Newlove.)

Cross-examination.

(By Mr. RITCHIE.)

Q. In the examination of the plaintiff in Doctor Boyle's office on the third of January, 1917, when you measured the plaintiff's clavicle, you made the actual measurement yourself? A. Yes, sir.

Q. Did you not at that time state that your estimate of the difference in length of the two clavicles was three-eighths of an inch? A. No.

Q. You are quite sure you did not?

A. I am quite sure of that. [249]

Q. Was the measurement made more than once?

A. Yes, sir, it was, if I remember correctly; I think we all made it a time or two.

Q. And did you all agree it was a quarter of an inch or a little more?

A. As I remember, I think we were all of about the same opinion.

Q. You are sure you didn't decide it was three-eighths? A. I am quite sure.

Q. There is no possibility of your being mistaken?

A. Of course, there might be; in a muscular man, the part being covered with muscles, there might be a fraction of an inch one way or the other.

Q. There is hardly any chance of your being mistaken in your statement?

A. I don't think so; if I remember right, one side was $5\frac{1}{2}$ and the other $5\frac{1}{4}$.

Q. As a matter of fact, on account of the end of the bone being rounded, it would be difficult for a skilled surgeon to be mathematically exact in placing the

(Testimony of George Newlove.)

tape each time in the same location, the exact location? A. I should think so.

Q. You might measure it half a dozen times and get a slight variation each time?

A. Yes, sir, a fraction of an inch.

Q. You spoke a while ago of it being probable, in the case of the use of the right shoulder in hard muscular exertions, such as a laboring man uses it, that the bone would be slightly enlarged?

A. It might be.

Q. Is it or is it not true, in the case of a man who has earned his livelihood by hard manual labor that the right clavicle, he [250] being a right-handed man, is slightly larger than the left?

A. It might be possible.

Q. And in that case, then, it would be abnormal for the left clavicle to be found a quarter of an inch longer than the right clavicle, would it not?

A. In that case, it would be.

Q. It is probably true that an abnormality is not always an evidence of weakness? A. No.

Q. But it would be very unusual if the left clavicle was larger and longer than the right in a right-handed man?

A. Well, of course, you know in the formation of our anatomy there are slight variations in the size of bones. There might be a slight variation in the size of the bones of your arms and legs—there might be a quarter of an inch difference in the lengths or an eighth of an inch.

Q. Did you give an estimate of the extent of the

(Testimony of George Newlove.)

overlapping of the bone there?

A. I don't think there was any overlapping any more than you would expect to find in a fracture. Of course in a fracture there is an accumulation of ring callous and is bound to be in all cases of fracture. If it is of long duration by careful examination you can detect a little hardening or a little elevated surface.

Q. You are explaining, which is perfectly legitimate, but you do not quite answer my question, which was, what was the extent of the overlapping that you detected? A. It was very small.

Q. You have stated that you think there is a fairly perfect union of the bone there, whether there was an actual fracture or merely a contusion, which perhaps in its effects would amount to a [251] slight fracture, would it not? A. Yes.

Q. And you think there has been a fairly perfect union? A. Yes, a very good union.

Q. Is it not true that a bone which is not quite properly set in a perfectly healthy man would be very slow of healing and consequently would become in time perfectly sound but a little bit malformed?

A. That would depend upon the degree of displacement.

Q. If there was a very slight displacement—supposing that a person, not an expert in that business, used the best skill he could and got very nearly a normal replacement of the fractured member; if it was a strong man, wouldn't the reunion, so far as a healthy bone was concerned, be perfect and yet there would be a slight malformation which might amount to a

(Testimony of George Newlove.)

lameness or impairment of the use of the limb or the member?

A. I should say that thing would be more liable to happen in a weak or emaciated person than a man muscular and healthy.

Q. But the point is this—if the replacement of the injured member was not quite perfect, it would be much longer in healing than if perfectly set?

A. I don't know that it would be any longer in healing; the number of days or weeks intervening would probably be about the same unless there was some foreign matter got between the two and prevented the union.

Q. In the case of a slight misplacement, would that stimulate a greater growth of new bone?

A. It might.

Q. Wouldn't that be the probable result?

A. It might cause it.

Q. And if the bone was set or attempted to be reset in that way, with [252] a slight misplacement, it would very likely result in a great thickening of the bone there through the growth of new bone and to some extent an overlapping? A. It might.

Q. Isn't that the probable result?

A. It very often happens that way, yes.

Q. Nature is a greater healer itself, especially in healthy persons and young persons? A. Yes, sir.

Q. The defects in surgery are often overcome by the power of nature itself, isn't that true—slight defects, I mean? A. Yes, sometimes—slight defects.

(Testimony of George Newlove.)

Q. This is the case of a man who is thirty-three years old. A. Yes.

Q. He is a strong muscular man, is he not, apparently? A. Yes, sir.

Q. And as far as you are able to detect in perfect health? A. Yes, sir.

Q. And if this bone of his was fractured or severely contused and was not treated with good, perfect, surgical skill, nature in his case, could overcome that defect?

A. No, not unless the bones were in apposition.

Q. Would they have to be in exact apposition or approximate apposition?

A. If they were in approximate apposition, you would get quite a deformity there.

Q. Would the apposition have to be perfect?

A. It would have to be more or less perfect to get a good result.

Q. In putting him through these exercises, did you have him do it rapidly? [253]

A. I don't know how rapidly—ordinarily they are.

Q. You were here when Doctor Gross was demonstrating this morning? A. I was.

Q. And he had him place his arms this way (indicating)? A. Yes, sir.

Q. And that way (indicating)? A. Yes, sir.

Q. That is, he had him place his right hand on his left shoulder, rather slowly? A. Yes.

Q. And his left hand on his right shoulder rather slowly; to extend his hands forward almost hori-

(Testimony of George Newlove.)

zontally so his arms were outstretched, slowly, and put his arms backward, toward his back, and that was done slowly—suppose he went through all those movements rapidly, wouldn't it cause him pain, if there was anything wrong with him?

A. If there was anything wrong with the joint, it probably would.

Q. When you put him through those exercises, did you have him do it rapidly? Like this (indicating)?

A. No, not like that—in the ordinary way. I said, "Extend your arms," and put him through the regular motions.

Q. Did you have him go through it as rapidly and with the precision a man would go through ordinary exercises in a gymnasium? A. No.

Q. Do you think he could do that?

A. I think so.

Q. Do you think he can raise his right arm straight up, as I have mine now, so it is very nearly vertical?

A. In my opinion he has a perfect function there if he wants to use it. [254]

Q. Will you answer Yes or No?

A. Yes, I think he can.

Q. Could he put his arm up with a jerk as I did then?

A. Perhaps not quite with a jerk but I think he can extend his arm, if he wants to.

Q. If you had examined this man last Wednesday as a proposed recruit for the army, would you have passed him?

A. The way I will answer that question is this—I

(Testimony of George Newlove.)

believe if that man came to the recruiting office as a recruit, I don't think he would complain of these symptoms.

Q. Would you take him as a recruit for the army?

A. As far as the malformation is concerned, I would.

Q. As far as the use of his arm is concerned—do you think he could handle a sabre in the cavalry?

A. The way he goes through the movements in my presence, no, but from the testimony of Doctor Gross, who examined him last September and the testimony of Doctor Duckwall, who examined him three weeks after the injury, I would say, yes. Now, a man complains of pain and of course refrains from going through these particular motions, but a man who is anxious to go into the service, wouldn't appear before a recruiting officer if he had anything that he thought would cause an objection.

Q. Do you think he could go through the tactics of a soldier, if he understood them or knew them?

A. In my opinion, I think he could.

Q. You think, then, that his failure to use his right arm as freely as you and I can do with ours, is due either to unwillingness or a positive refusal to do so?

A. In my opinion, I think it is unwillingness.

Q. You think his ills are to some extent imaginary?
[255] A. I think so.

Q. You are not prepared to say, though, that at this time he has perfect use of his right arm and shoulder—the arm hasn't anything to do with it except so far as it is dependent on the shoulder?

(Testimony of George Newlove.)

A. He apparently, to me, in my presence, refused to go through the exercises; in other words, he hesitates about performing the proper functions of the joint, but I can, with passive motion, put him through all the motions. I can extend the arm and rotate it and work the arm in any position I want to. If there was any displacement or any ununited fracture or any inflammation of the bones or the covering surrounding the bone or any adhesions there at all, or rupture of the ligaments, which bind down the joint—this portion of the clavicle is fixed or immovable; the movable portion is the inner two-thirds or sternal end. In other words, when you move up your shoulder, the motion is here (indicating). If he had a condition of that kind, I couldn't do that—he would suffer excruciating pain.

Q. Do you think there is any possibility that there is a slight stiffening of the shoulder, as the result of this fracture, or whatever the injury was, and the thickening of the bone?

A. I am not prepared to say, there might be some little outgrowth there, but if there was anything of that kind, it could easily be relieved by proper treatment.

Q. Do you think he has as flexible use of his shoulder as he formerly had?

A. I think by proper massage and if he worked that arm, that arm would be in as good condition as his other arm.

Q. Would that take considerable time?

A. I couldn't exactly state as to the time. [256]

(Testimony of George Newlove.)

Q. It is much more common for a fractured bone to recover its normal strength than for the member to which it belongs to recover the original flexibility, is it not?

A. That is true, but in this case, the fracture, or the bruise, we may call it, or whatever it was, is away from the articulation.

(By Mr. DONOHOE.)

Q. If you were called upon to treat this case, and the plaintiff complained of the pain he has complained of to you, in your examination, what sort of treatment would you prescribe?

A. Massage, stimulating liniments, probably application of heat.

Q. Mr. Ritchie asked you if you would pass a recruit in the army who had a malformation of his right clavicle to the extent that this plaintiff has—I will ask you if it is not a fact that H. W. Ells, a present enlisted man at Fort Liscum, has a right clavicle that is much more malformed than the plaintiff's right clavicle?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

The COURT.—On the redirect examination it becomes admissible; objection overruled. Plaintiff allowed an exception.

A. He has.

Q. I will ask you, Doctor, if H. W. Ells has any difficulty in going through the manoeuvres of exercises prescribed by the army and particularly in using his right arm and right shoulder.

(Testimony of George Newlove.)

Mr. RITCHIE.—Same objection.

The COURT.—It should be limited and is limited to the one question, whether he would admit such a person. He was asked that question and now you have designated the person whom he has testified has a much greater malformation—everything would be covered by his statement that he would admit him to the service. The objection will be sustained.

Defendant allowed an exception to the ruling.
[257]

Q. Have you, since the examination you made of the plaintiff on the third day of January, 1917, made an examination of H. W. Ells in regard to his right clavicle?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Witness excused.

Testimony of Harry W. Ells, for Defendant.

HARRY W. ELLS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. Harry W. Ells.

Q. Where do you reside at this time?

A. At Dodge City, Kansas.

Q. Are you connected with Fort Liscum Army Post? A. I am.

Q. And a member of the United States Army?

(Testimony of Harry W. Ells.)

A. Yes, sir.

Q. How old are you?

A. Twenty-one years old.

Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that resulted in the fracture of the right clavicle was it before you resumed work?

Same objection. [258]

The COURT.—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHUE.—I know, but I don't know how else I can get this into the record.

The COURT.—In order that counsel may understand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and their experience. Now, it certainly would not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. DONOHUE.—No, I do not propose to do that. In the examination yesterday, Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the shoulder what he called a

(Testimony of Harry W. Ells.)

malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate positively that the overlapping of the clavicle in the union was half an inch, and then demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further, propose to stand the two men up there, side by side, so the jury could examine them and pass upon them themselves. It is a demonstration, not expert testimony—just as the plaintiff had the right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. * * * I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a [259] similar or more extensive malformation, who has the full use of his arm.

The COURT.—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. RITCHIE.—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

(Testimony of Harry W. Ells.)

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Witness excused.

Mr. DONOHOE.—Defendant rests.

Mr. RITCHIE.—Before defendant rests I ask permission to recall Doctor Gross for further cross-examination.

(No objection.)

**Testimony of Elmer C. Gross, for Defendant
(Recalled—Cross-examination).**

Doctor GROSS, recalled for further cross-examination.

(By Mr. RITCHIE.)

Q. I am not sure whether I asked you this question or not— In the examination that you made of the plaintiff on last Wednesday in Doctor Boyle's office, did you have the plaintiff extend his right arm upward, vertically, as far as he could, like this?

A. Yes, sir, I did.

Q. Was he able to do it, unassisted?

A. He wouldn't do it; he didn't do it unassisted.

[260]

Q. In each instance one of you doctors raised the arm for him? A. Yes, sir.

Q. Did you try to make him throw his arm up quickly like that (indicating)?

A. I don't think any of these movements were

(Testimony of Elmer C. Gross.)

hurried—he was simply asked to do it.

Witness excused.

DEFENDANT RESTS.

REBUTTAL.

Mr. RITCHIE.—I just want to be sworn to make a statement, with permission to address the jury afterwards.

Mr. DONOHOE.—No objection.

Testimony of E. E. Ritchie, Plaintiff (in Rebuttal).

E. E. RITCHIE, sworn as a witness in behalf of the plaintiff, in rebuttal, testified as follows:

(Examination by Mr. LYONS.)

Q. You are one of the attorneys for the plaintiff in this case? A. I am.

Q. You had some correspondence with Messrs. Donohoe & Dimond with reference to having the plaintiff here go to Ellamar to be examined by a physician? A. Yes.

Q. Will you please tell the jury what talk you had about the matter?

A. I simply want to make some statements I made—

Mr. DONOHOE.—We object to any statements made to us; it would be self-serving declarations.

The WITNESS.—I mean at the time you stated that you were representing the Ellamar Mining Company and I had been referred by letter to you. I want to make an explanation in regard to [261] this correspondence.

The COURT.—The correspondence itself appears in the pleadings.

(Testimony of E. E. Ritchie.)

The WITNESS.—The original letters are put in evidence, which were in my possession. I want to repeat the statements I made to Donohoe & Dimond at the time of this correspondence.

Mr. DONOHOE.—I object to any such statements; he may have talked to Mr. Dimond at some time; I know nothing about that.

The COURT.—It seems to me any statements which may have been made, leading up to any communications which are admitted in the pleadings or the evidence, would be incompetent.

The WITNESS.—They are simply referring to the proposition to have this man go down there and be examined at Ellamar.

Mr. DONOHOE.—I object to any such statements. I don't know what they are; I have no recollection of any particular statements being made to me and Mr. Dimond is not here.

Objection sustained; plaintiff allowed an exception to the ruling.

Witness excused.

EVIDENCE CLOSED.

Recess until this evening at eight o'clock. [262]

Saturday, January 6, 1917—Evening Session.

Instructions of Court to Jury.

By the COURT:

Gentlemen of the Jury: You are instructed that in this case the judge and jury have separate though important functions to perform. It is your duty to weigh and consider the evidence, all of which is addressed to you. It is the duty of the Judge of this

Court to instruct you as to the law in the case, and you are required to accept as the law what is given you as such by the Court, and upon the law and the evidence, to render a just and true verdict as you have sworn to do.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption, or other evidence, satisfying to your minds.

2.

In civil cases the affirmative of the issue shall be proved and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your minds. That is not sufficient. That is, if the testimony of the plaintiff weighs [263] just the same as that of the defendant, you must find for the defendant. The plaintiff can only recover where his testimony outweighs that of the defendant.

Where the Answer of the defendant contains an affirmative defense or defenses, the burden of estab-

lishing the same by a fair preponderance of the evidence is upon the defendant. In other words, in order to avail itself of the affirmative defenses set up in its Answer, the defendant must establish the same by a fair preponderance of the evidence submitted to you to prove such defenses.

3.

You are instructed that evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is within the power of the one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfying evidence is offered when it appears that the stronger and more satisfactory evidence was within the power of the party offering the same, the evidence so offered should be viewed with distrust.

4.

You are instructed that certain evidence was admitted for your consideration for limited purposes only and that at the time of its admission your attention was directed to the limited purposes for which it was admitted. Such evidence must be considered by you for the limited purposes only for which it was admitted. [264]

5.

You are instructed that a witness wilfully false in one part of his testimony may be distrusted in others, and if you find that a witness has wilfully testified falsely in one part of his testimony, you may reject all or any part of his testimony, but you are not bound so to do. You should reject the false part and give such weight to other parts as you may think

they are entitled to receive at your hands.

You should not fail to weigh and consider and give proper effect to all the evidence in the case which you believe to be truthful. It is your duty to determine what is the truth of the testimony presented and upon the facts of the case, to render a verdict accordingly.

6.

In determining the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, his feeling for or against any of the parties to the action, the probability or improbability of the witness' statements, the opportunity he had to observe and to be informed as to matters respecting which he testified, and the inclination he evidenced in your judgment to speak truthfully or otherwise concerning the matters within the knowledge of such witness.

7.

The law you will be required to apply to the facts you will find in determining the measure of liability attaching [265] to the defendant in the first cause of action is as follows:

“Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally and permanently disabled, he or she shall be entitled to receive compensation as follows: * * *

(b) If such employee at the time of his injury had no wife or children, but had a mother or father

dependent upon him, Four Thousand Two Hundred (\$2400.00) Dollars. * * *

(e) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother dependent upon him, he shall receive the sum of Three Thousand Six Hundred (\$3600.00) Dollars. * * *

For all other injuries (the injury in this case not being within the schedule of injuries) causing temporary disability, the employer shall pay to the employee, during the period of such disability, fifty per cent (50%) of his daily average wages. Provided, however, that the period for the payment for temporary disability shall not exceed six (6) months. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, and the employee has been paid compensation for temporary disability, the amount so paid him shall be deducted from the amount to which he shall be entitled under such provision in this schedule. * * *

Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally or permanently

disabled, that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Four Thousand Eight Hundred (\$4800.00) Dollars.

To illustrate: If said employee were of a class that would entitle him or her to Four Thousand Eight Hundred (\$4800.00) Dollars under this schedule, if he or she were totally and permanently disabled and his or her injury would be such as to reduce his or her earning capacity twenty-five (25%) per cent, he or she would be entitled to receive One Thousand Two Hundred (\$1200.00) Dollars; it being the amount that bears the same relation to Four Thousand Eight Hundred (\$4800.00) Dollars that twenty-five (25%) per cent does to one hundred (100%) per cent. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per cent, he or she would be entitled to receive Three Thousand Six Hundred [266] (\$3600.00) Dollars; it being the amount that bears the same relation to Four Thousand Eight Hundred (\$4800.00) Dollars that seventy-five (75%) per cent does to one hundred (100%) per cent. * * *

Section 24. The employee shall, after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished

and paid for by the employer. The employee shall have the right to have a physician, provided and paid for by himself, or herself, present at such examination or examination. If any employee refuses to submit himself or herself to any such examination or examinations provided for in this Act, or in any way obstructs any such examination or examinations, his or her rights to compensation shall be suspended, and his or her compensation, during such period of suspension, may, in the discretion of the jury or Court determining an action brought for the recovery of compensation under this Act, be forfeited.”

8.

You are instructed that plaintiff's first cause of action is a special proceeding brought pursuant to the provisions of Chapter 71 of the Session Laws of the Territory of Alaska for the year 1915 and is brought for the purpose of determining the amount of compensation that the plaintiff is entitled to receive for any injury he may have sustained in an accident occurring on the 12th day of January, 1916, in the defendant company's mine at Ellamar, Alaska, arising out of and in the course of his employment as a miner for defendant in its mining operations.

Under the Compensation Law it does not matter or concern you as to who was responsible for the accident, therefore you will not consider that subject. The defendant admits that the plaintiff did receive some injury in the accident on the 12th day of January, 1916, while in the course of his employment as a miner and the only question for you to determine is the extent [267] of these injuries, as to whether

they caused a temporary disability, and if so, the duration of said temporary disability, or a permanent disability, and if a permanent disability, to what extent has his ability to earn money as a miner been permanently decreased by the injury, and one other question, did the plaintiff at the time of the injury have a mother dependent upon him for support.

9.

You will observe from the pleadings that the plaintiff in the First cause of action, in his Third Amended Complaint, claims compensation for a permanent disability in the sum of \$1400, said sum being $33\frac{1}{3}\%$ of \$4200. This claim arises in the following manner: First, If being single and no one dependent upon him, in the event of permanent total disability, he would be entitled to receive \$3,600; second, If single, with a mother dependent upon him at the time of his injury, and if said injury effected a permanent total disability, he would be entitled to receive \$4,200.

The position taken by the defendant is that the injury as such did not cause a permanent partial disability but caused a temporary disability for a period of one hundred and five days, for which said temporary disability the plaintiff is entitled to receive from the defendant 50% of \$4 per day for 105 days, or the sum of \$210.

From the evidence submitted relative to the first cause of action, and you are instructed that any evidence of negligence or malpractice complained of in the second cause of action is to be eliminated by you in determining what the [268] facts are in the

first cause of action, you will proceed to find what compensation the plaintiff is entitled to receive under his first cause of action by determining:

- First. Had the plaintiff a mother dependent upon him at the time of his injury?
- Second. Did such injury, as such, cause a permanent partial disability?
- Third. If it did cause a permanent partial disability, by what per cent did it reduce plaintiff's earning capacity?
- Fourth. Did such injury as such cause a temporary disability?
- Fifth. If it did cause a temporary disability, what was the period of time, expressed in days, of such temporary disability?
- Sixth. Did the plaintiff during his period of temporary disability, if you find by a fair preponderance of the evidence that he suffered a temporary disability, refuse to submit himself to an examination by a physician or surgeon or in any way obstruct any such examination, under the provisions of Section 24, hereinbefore set forth?
- Seventh. If you find that the plaintiff, during a period of temporary disability caused by said injury as such, did refuse to submit himself to an examination by a physician or surgeon, or did obstruct any such examination under the provisions of said Section 24, for what period of time in days in your judgment

shall the plaintiff forfeit his right to compensation, providing you find there should be any forfeiture declared by you?

10.

Having proceeded as above indicated, you will then determine what compensation plaintiff is to receive under his first cause of action. And in order that the Court may determine the correctness of your computation in arriving at the compensation you award the plaintiff on his first cause of action, special findings covering the above seven questions for your consideration will be submitted to you and will be [269] returned answered by you, together with your verdict in the case.

11.

You are instructed that an employer has a legal right to require an employee who claims from him compensation or damages because of alleged injuries sustained in the course of employment, to submit to physical examination at reasonable times, in order that the employer may inform himself of the nature and extent of the injuries in question.

You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant's premises and to control his own movements, and defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant's premises on defendant's order.

If you find for the evidence that defendant at any time after the accident in this case discharged plaintiff from its hospital and refused him further surgical and medical care, and he thereupon came to Valdez, it could not require him thereafter to go to Ellamar for examination, but it could at reasonable times require him to submit to examinations wherever it might find him, by a competent surgeon of its own selection.

In this connection you are also instructed that you may take into consideration defendant's offer to furnish transportation for plaintiff from Valdez to Ellamar and return, if you find such an offer was made, and plaintiff's refusal to go, if [270] you find there was such a refusal, in determining whether or not plaintiff, at a reasonable time, obstructed any physical examination proposed to be made by the defendant.

12.

I instruct you that the phrase "temporary disability" means such a disability, not permanent in character, but which incapacitates the plaintiff from earning full wages for a limited period of time, and the phrase "permanent disability" means such a disability as would incapacitate the plaintiff from earning full wages for the remainder of his life.

13.

I instruct you that the word "dependent" means "One who is sustained by another or one who relies upon another for support."

Before you can find that the plaintiff's mother as alleged was dependent upon plaintiff, you must find

by a fair preponderance of the evidence that at the time of the injury, or for a reasonable time immediately prior thereto, plaintiff was supporting her and that she was relying upon plaintiff for her support.

14.

The Court will now direct your attention to the second cause of action set forth in plaintiff's complaint. This cause of action is separate and distinct from plaintiff's [271] first cause of action and must so be considered by you.

In brief, plaintiff alleges that by virtue of an arrangement existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission, and during his stay there, no competent surgical and medical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service, which aggravated the result of his

original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain, and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled.

15.

The defendant denies any liability under plaintiff's second cause of action; affirmatively pleads a proper discharge of [272] all obligations devolving upon it by virtue of the arrangement between plaintiff and defendant for competent surgical and medical attendance, to be furnished plaintiff at defendant's expense for any injury or illness arising in the course of plaintiff's employment by defendant; affirmatively, as a defense, pleads an offer to furnish plaintiff competent medical attendance to entirely relieve him of his alleged soreness complained of upon examination, and that plaintiff refused said offer. Plaintiff by his Reply generally denies the affirmative matter set up by defendant.

16.

You are instructed that the arrangement whereby defendant deducted \$1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish plaintiff competent surgical and medical attendance, free of charge, for any

injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded.

17.

The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or [273] improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence, he is entitled to recover damages caused by the unnecessary physical pain, mental (torture) suffering and physical disability suffered by him through defendant's negligence or malpractice.

18.

You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for the plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for injury due to that cause; that is, such a sum as will reasonably compensate him for impairment of his earning power, if you

find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment. [274]

19.

The plaintiff in this case has offered in evidence, pursuant to a stipulation with the defendant, a statement of the testimony of Dr. W. H. Chase and I instruct you that this statement is legal evidence on behalf of the plaintiff and has the same force and effect as if Doctor Chase were present in court and testified orally before you on oath; and you are bound to give his testimony the same force and effect and consideration that you would give were the witness present in court and testified orally.

20.

The defendant in this case has offered in evidence pursuant to a stipulation with the plaintiff a statement of the testimony of Dr. Bertram F. Duckwall and I instruct you that this statement is legal evidence on behalf of the defendant and has the same force and effect as if Doctor Duckwall was present in court and testified orally before you on oath; and

you are bound to give his testimony the same force and effect and consideration that you would give were the witness present in court and testified orally.

21.

You are instructed that an act of negligence if it produces no evil results will not subject the one committing such an act to liability for damages, for if there is no actual damage, there can be no recovery, be the act ever so negligent; if, therefore, the defendant did commit acts of negligence or malpractice [275] involving the rights of the plaintiff, but if the same caused no damage capable of determination by you, there can be no recovery under the second cause of action.

22.

I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine, at Ellamar, Alaska, on the 12th day of January, 1916; and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you that before you can find for the plaintiff on his second cause of action you must be able to determine that his original injury has been aggravated, thereby causing additional physical and mental suffering or physical disability,

or both, and that the same is of such a definite and appreciable nature that you are warranted in assessing money damages against the defendant to cover the same. Any such physical and mental suffering and physical disability must be separate and apart from the mental and physical suffering and physical disability the plaintiff sustained as the normal result of the original injury.

23.

I instruct you that even if the defendant failed to furnish [276] the plaintiff with timely and sufficient surgical care and medical and hospital services that it was the duty of the plaintiff to seek surgical aid and medical care from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover damages for permanent disability, physical and mental suffering, caused by his neglect, if you find there was any neglect on his part to use reasonable means at his command to relieve his alleged impaired physical condition, or to avail himself of an opportunity so to do at the expense of the defendant, if you find such an opportunity was so extended by defendant.

24.

You are instructed that the plaintiff in his second cause of action is not entitled to recover from the defendant anything on account of the pain, suffering and disability caused by the original injury, but only for such additional pain, suffering and injury

as is produced by the negligence or want of skill of the employees and agents of the defendant, in the treatment of plaintiff, under the direction of defendant.

25.

I instruct you that under the hospital arrangement between the defendant and its employees, as set out in the pleadings and as testified to by the various witnesses, the defendant company was not bound to maintain a physician and [277] surgeon at its mine at Ellamar, and its mere failure to have a physician and surgeon at its mine, at the time of the accident in which the plaintiff received his injuries, is not such negligence on the part of the defendant as would enable the plaintiff to recover any damages in this second cause of action.

26.

In making up your verdict you should not take into consideration any evidence sought to be introduced but stricken by the Court, neither should you permit the remarks or expressions of counsel to influence you in arriving at a verdict unless such remarks or expressions are based upon the evidence in the case or are reasonably inferred therefrom.

27.

Herewith I hand you the instructions I have just read to you, together with such of the pleadings as are properly submitted for your inspection; also the exhibits and forms of verdict, to assist you in the preparation of the same. I also submit special findings which you will make and return with your verdict. [278]

Exceptions of Plaintiff to Instructions of Court to Jury.

Mr. RITCHIE.—If the Court please, before the jury retires, the plaintiff at this time desires to except to the instruction of the Court providing that the jury shall make special findings number 6 and 7, on the ground these instructions and those findings impose upon the plaintiff a legal liability to which he is not subject, and interpose in behalf of the defendant a legal defense, to which it is not entitled. Plaintiff also excepts to the last paragraph of instruction No. 11 upon the ground just stated, that it imposes upon the plaintiff a legal liability which is not imposed upon him by the law, and interposes in behalf of the defendant a defense to which it is not entitled.

Plaintiff further excepts to the whole of instruction No. 23 upon the ground that it confuses the liability, if any, imposed in this case upon the plaintiff for contributory negligence; any liability for contributory negligence to which he might be subject has been stricken from the common law and repealed by chapter 45 of the Session Laws of 1913, which provides in the second section for the apportionment of liability in case of contributory negligence on the part of the plaintiff and we except further to the last two lines, beginning in the third line from the bottom, following the word "condition," the part reading as follow:

"Or to avail himself of an opportunity so to

do at the expense of the defendant, if you find such an opportunity was so extended by defendant.”

Upon the ground that there was no legal liability under any circumstances.

We except to the last two lines and a half referring to the opportunity claimed to have been extended by defendant to plaintiff upon the ground that at that time it had absolutely forfeited [279] any right under his previous existing contract to claim his attendance at Ellamar at all. They still had a right to make a physical examination of him where they could find him, but they could not, under any circumstances, require him to be recalled at Ellamar, because having been guilty of a breach of the contract themselves, they could no longer claim anything under the contract.

By the COURT.—The exceptions will be allowed.

Mr. DONOHOE.—The defendant at this time excepts to instruction No. 11 as given by the Court which states that the defendant denied the existence of the injuries of plaintiff, etc., and refused further surgical and medical care, etc., on the ground that it is assuming a fact not testified to in the case, there being no testimony whatever introduced that the defendant ever denied the existence of plaintiff's injury or ever denied or refused him further surgical care and aid, and on the ground that such instruction does not state the law governing plaintiff's first or second cause of action, and on the further ground that instruction No. 11 seems to apply to plaintiff's first cause of action and covers ground entirely for-

eign to this cause of action, and has no reference whatever to plaintiff's first cause of action.

Defendant excepts to instruction No. 14 on the ground that the same does not correctly state the allegations of plaintiff's complaint as set forth in the second cause of action and does not correctly state the testimony offered in behalf of plaintiff in support of his second cause of action and therefore has a tendency to bias and prejudice the jury against the substantial rights of the defendant.

Defendant excepts to instructions No. 16 on the ground that the [280] same does not state the law correctly concerning the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence, and seems to convey to the jury that the defendant, under the terms of said contract, was obliged to maintain at its mine at Ellamar, Alaska, a competent physician to pass upon the injuries to the plaintiff at the time they occurred; all of which is prejudicial to the substantial rights of the defendant and not the law governing the case.

Defendant excepts to instruction No. 17 on the ground that the same does not state the law governing the case, and the same is prejudicial to the substantial rights of the defendant, because it does not state the evidence and allegations of the pleadings correctly, in that it uses the phrase "mental torture," which does not appear in the pleadings and was not used in any of the evidence; likewise uses the word "malpractice," which does not appear in the evidence or pleadings. Further, it authorizes the jury to find under the second cause of action for the

same matters or things covered by the first cause of action.

Defendant excepts to instruction No. 18 on the ground that the same does not state the law governing plaintiff's second cause of action, in that it instructs the jury that they may find for plaintiff on the second cause of action for the same matters and things alleged in the first cause of action for which he would be fully compensated if the jury find in his favor in the first cause of action, and further, any verdict found by the jury in favor of the plaintiff on the second cause of action would be entirely speculative and not based upon any evidence offered at the trial. [281]

Defendant excepts to the refusal of the Court to give instruction No. 5 offered and requested by the defendant to be given to the jury as the law governing plaintiff's first cause of action in its entirety; and further excepts on the ground that said instruction is not wholly covered by other instructions of the Court. The requested instruction is as follows:

"I instruct you that under the Compensation Act, under which plaintiff's first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such

period of such refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination and the plaintiff did not do so, then I instruct you that from the time of said request until the plaintiff did submit to such an examination, he is not entitled to compensation, and you should consider this instruction in considering your answer to question number 2 herewith submitted."

Defendant excepts to the refusal of the Court to give defendant's instruction No. 3 offered and requested to be given to the jury in its entirety, in regard to plaintiff's second cause of action, on the ground that the same is not covered by other instructions, in that none of the other instructions contain that part of requested instruction number 3, which provides that it was the duty of the plaintiff to make known to the defendant that he wanted further medical and surgical aid and unless he did make such demand of the defendant, the defendant was not liable. The requested instruction is as follows:

"I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound [282] to furnish plaintiff the services of a specialist in surgery, and if the plaintiff was dissatisfied with the treatment he received in the defendant's temporary hospital at Ellamar, or was dissatisfied with the opinion

given by Doctor Duckwall as to the condition of his right clavicle on or about the tenth day of February, 1916, then it was the plaintiff's duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff."

Defendant excepts to the refusal of the Court to give instruction number 4 in regard to plaintiff's second cause of action offered and requested by the defendant to be given by the Court to the jury as the law governing plaintiff's second cause of action, as follows:

"I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore, you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account."

Defendant excepts to the refusal of the Court to give instruction number 5 in regard to plaintiff's second cause of action, offered and requested to be given to the jury by the Court as the law of the case, as follows:

“I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff too seek surgical aid and medical care from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to, but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care.” [283]

Defendant excepts to the refusal of the Court to give instruction number 6 in regard to plaintiff's second cause of action, as offered and requested to be given by the Court to the jury as the law of the case, for the reason that the same is not covered by other instructions given by the Court, in that they do not contain that portion of requested instruction number 6 to the effect that the jury must be able to determine with reasonable certainty the amount that plaintiff's original injury has been aggravated and the amount of physical and mental suffering plaintiff has undergone by reason of the alleged neglect on the part of the defendant as separate and apart from the natural results of the original injury. The requested instruction is as follows:

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for in-

juries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916; and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine, with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence, you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

Defendant excepts to the refusal of the Court to give defendant's requested instruction number 7, as offered and requested by the defendant to be given as the law of the case in regard to plaintiff's second cause of action, as follows: [284]

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant

to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

Defendant excepts to the ruling of the Court in refusing to give defendant's instruction number 9, offered and requested by defendant to be given to the jury as the law regarding plaintiff's second cause of action, as follows:

"I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he notified the plaintiff and the defendant that the plaintiff had entirely recovered from his injury, and the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall; then I instruct you that the defendant was justified in relying upon the opinion so expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was plaintiff's duty to immediately notify said defendant of this fact and to demand

of defendant such further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract; and unless you find from the evidence that the plaintiff did make such a demand on the defendant and the defendant refused to comply with such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff claimed to be suffering from said injury, after he had left Ellamar, the defendant company in good faith immediately offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you that the defendant company did all that was required of it under its hospital contract with plaintiff, and you must find for the defendant and against the plaintiff." [285]

The COURT.—With reference to the exception taken by the defendant to instruction number 17 and so much thereof as referred to the phrase "mental torture"—the instruction is modified and the jury are so instructed—that the word "torture" is stricken out of the instruction and the word "suffering" is substituted, so that the instruction will now read:

"The parties being brought into this relation above described, the plaintiff may maintain an action for the breach of the implied obligation

caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence, he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice."

As to all the other exceptions presented on the part of defendant, they are allowed. The bailiffs may come forward and be sworn.

(Bailiffs sworn.)

The COURT.—Mr. Donohoe, I do not think the form of verdict you have handed me covers the situation. This is the form that I think should be submitted. (Handing to counsel.)

Mr. DONOHOE.—Is that the verdict you propose to hand to the jury?

The COURT.—That is one of the forms.

Mr. DONOHOE.—I want to make some exceptions to that.

The COURT.—If you desire to take an exception to the Court's submitting a form of verdict, I do not know that it is subject to an exception. Forms of verdict are submitted to a jury for the purpose of enabling them to arrive at a correct expression of what may be their verdict. * *

Mr. DONOHOE.—My theory of the case has been all the way through that there would have to be two verdicts—the first would consist [286] of special findings and on the second cause of action an ordi-

nary verdict. I think I have a perfect right to ask an exception to whatever verdict the Court submits to the jury.

The COURT.—The Court is not submitting a verdict to the jury; the Court is submitting a form of verdict which they may use if they choose in making up their verdict; it is not directory to the jury—they will not use it unless they so desire, but if they so desire, they may use it in making up their verdict.

Mr. DONOHOE.—At this time the defendant requests the Court to submit to the jury as a form of verdict in regard to the second cause of action, the verdict submitted to the Court by the defendant, as follows:

“We, the Jury, sworn and empanelled to try the above-entitled cause, find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint.”

The COURT.—Which the Court refuses to do, for the reason that if it were used by the jury, it would not be a verdict in the case. It may be filed, however, and an exception will be allowed.

Mr. DONOHOE.—Now, the defendant excepts to the verdict submitted by the Court, which includes a money judgment on the first cause of action, provides for a money judgment on the first cause of action, upon the ground that all the jury can find in the first cause of action is special findings, upon which the Court makes up its judgment.

The COURT.—As the Court has already stated,

the Court is not submitting any verdict to the jury, and that portion of your exception is absolutely incorrect. I am not submitting any verdict to the jury—the Court is submitting a form of verdict which the jury may use if they so desire, in assisting them to make up their verdict. The Court has no authority to submit a verdict to the jury and I am not submitting a verdict to the jury—the [287] jury finds the verdict.

Mr. DONOHOE.—Instead of a verdict I will say, form of verdict.

The COURT.—Very well—the exception will be allowed. The jury may now retire in the custody of the bailiffs.

Sunday, January 7, 1917, 1 P. M.

(The jury returns into court with their verdict and special findings which are read by the clerk.)

Exceptions of Defendants to Form of Verdict.

Mr. DONOHOE.—Before the jury is discharged, at this time the defendant excepts to the form of verdict, in that, under the first cause of action the jury are not warranted in finding any specific sum as plaintiff's damages. They should find, under special findings, the percentage of his loss of earning power and the Court would fix, from their special findings, the amount of compensation; and we except to the verdict, that relating to the second cause of action, on the ground that the same is not warranted by the evidence. We also except to the special finding which estimates the plaintiff's damage at a higher percentage than that pleaded in the complaint, the third amended complaint, the third amended com-

plaint pleading that the plaintiff had been permanently injured thirty-three and one-third per cent and the jury finding the degree of permanent injury to be thirty-eight per cent.

The COURT.—The exceptions will be allowed. The matter of the 33 $\frac{1}{3}$ % and the 38% appears to the Court to be a legal proposition which will have to be taken up later. [288]

Certificate of Stenographer to Proceedings, etc.

I do hereby certify that I am the official court stenographer for the Third Judicial Division of Alaska: That as such I reported the proceedings had and testimony presented at the trial of the above-entitled cause, to wit: Tony Possus vs. Ellamar Mining Company, a Corporation. That the above is a full, true and correct transcript of the testimony introduced and proceedings had at said trial.

Dated Valdez, Alaska, February 10, 1917.

I. HAMBURGER.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [289]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Special Findings.

The jury are instructed to make answer to the seven questions herewith submitted, the same to be and constitute their Special Findings in the first cause of action, and sign each by their foreman.

First. Had the plaintiff a mother dependent upon him at the time of his injury?
No.

C. H. KRAEMER,
Foreman.

Second. Did such injury, as such, cause a permanent partial disability? Yes.

C. H. KRAEMER,
Foreman.

Third. If it did cause a permanent partial disability, by what per cent did it reduce plaintiff's earning capacity? 38%.

C. H. KRAEMER,
Foreman.

Fourth. Did such injury as such cause a temporary disability? No.

C. H. KRAEMER,

Foreman.

Fifth. If it did cause a temporary disability, what was the period of time, expressed in days, of such temporary disability? None.

C. H. KRAEMER,

Foreman.

Sixth. Did the plaintiff during his period of temporary disability, if you find by a fair preponderance of the evidence that he has suffered a temporary disability, refuse to submit himself to an examination by a physician or surgeon or in any way obstruct any such examination, under the provisions of Section 24, hereinbefore set forth? No.

C. H. KRAEMER,

Foreman.

Seventh. If you find that the plaintiff, during a period of temporary disability caused by said injury as such, did refuse to submit himself to an examination by a physician or surgeon, or did obstruct any such examination under the provisions of said Section 24, for what period of time in days in your judgment shall the plaintiff forfeit his right to compensation, providing you find

there should be any forfeiture declared
by you? None.

C. H. KRAEMER,
Foreman.

Dated Valdez, Alaska, January 7th, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 11, page 101. [290]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Verdict.

We, the jury duly impaneled and sworn in the above-entitled cause, do upon our oaths find as follows:

On the first cause of action stated in plaintiff's third amended complaint we find for the plaintiff and assess his damages at \$1368.00.

On the second cause of action stated in plaintiff's third amended complaint we find for the plaintiff and assess his damages at one dollar.

C. H. KRAEMER,
Foreman.

Dated Valdez, Alaska, January 7, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 7, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 11, page 101. [291]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONNY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Motion for Judgment in Favor of Defendant,
Notwithstanding the Verdict.**

Comes now the above-named defendant and moves this Honorable Court to enter judgment in favor of defendant and against the plaintiff, notwithstanding the verdict and special findings of the jury, found and returned in court on the 7th day of January, 1917, in the following particulars:

First. That in regard to plaintiff's first cause of action the Court enters judgment against the plaintiff and in favor of the defendant, adjudging, that the plaintiff did not sustain a permanent partial disability by reason of the injuries he received, set forth and described in the pleadings, for the following reasons:

- (a) That the facts stated, in the first cause of action of plaintiff's third amended complaint do not constitute the cause of action, against the defendant, entitling plaintiff to a judgment that he has sustained a permanent partial disability to any degree whatever.
- (b) That the testimony offered at the trial of said action on behalf of plaintiff is not sufficient to sustain a verdict that the plaintiff had sustained a permanent partial disability to any degree whatever.

Second. That in regard to plaintiff's second cause of action that the Court enter judgment against the plaintiff and in favor of the defendant, on the ground that the facts stated, in plaintiff's second cause of action, set forth in his third amended complaint are not sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

DONOHUE & DIMOND,
Attorneys for Defendant.

I hereby accept service of the above by receiving a copy thereof this 9th day of January, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[292]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Denying Motion for Judgment in
Favor of Defendant Notwithstanding the Verdict.**

Now on this day this motion came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff and Donohoe & Dimond and W. S. Bonnifield appearing as attorneys for defendant, and on behalf of motion, and after argument had and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is allowed.

September, 1916, Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 106.
[293]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict and special findings, found and returned by the jury, in said cause, on the 7th day of January, 1917, and granting said defendant a new trial of said cause on the following grounds:

First. Excessive damages, on plaintiff's first cause of action, appearing to have been given by the jury under the influence of passion and prejudice, in this: The jury in their third special finding find that plaintiff's earning capacity, by reason of said injury, has been reduced permanently 38%, and in their verdict assess his compensation at \$1368; the plaintiff in his complaint does not claim that his earning capacity, by reason of said injury, has been reduced permanently more than 33 $\frac{1}{3}$ per cent. This under the findings and the law governing compensation does not entitle the plaintiff to a judgment on his first cause of action for more than \$1,200, and even

\$1,200 would be excessive as compensation for plaintiff's injury under the evidence and could not be reached or assessed by the jury from any of the evidence offered at said trial. The only evidence offered in the entire trial tending in any manner to establish the fact that the plaintiff was permanently injured was that of Dr. Boyle and this witness, under cross-examination, refused to state that plaintiff was permanently injured and did state that massage treatment and application of liniment, in the region of plaintiff's [294] right clavicle, would probably restore plaintiff's full use of his right arm and shoulder and the entire evidence establishes the fact that if plaintiff has sustained any permanent injury, whatever, by reason of the accident and a permanent disability resulting therefrom, would be very slight.

Second. Insufficiency of the evidence to justify the verdict and that said verdict is against the law for the following reasons:

(a) There is no evidence whatever introduced at the trial that would sustain the finding of the jury, that plaintiff is now suffering from permanent disability or partial permanent disability to the extent that the same would reduce his earning capacity for the remainder of his life nor does the plaintiff in any of his pleadings allege that he is permanently disabled or permanently partially disabled. The only testimony offered at the trial of this case which in any manner tends to establish that the plaintiff is permanently partially disabled was the testimony of Dr. Boyle and this testimony was uncertain and vague, and on cross-examination the witness ad-

mitted that he could not at this time form an opinion as to whether or not the plaintiff was permanently partially disabled, but did state that, in his opinion, massage treatment with applications of liniments would greatly improve plaintiff's condition; he also testified to making an examination of plaintiff, in July, 1916, and recommended such treatment to plaintiff and plaintiff did not ask him to treat him; the witness also testified that in his experience as a physician and surgeon he had treated many patients for broken clavicles but had never seen a case that caused permanent partial disability; Drs. Gross and Newlove, witnesses for the defendant, testified that from a careful examination of the plaintiff they were quite positive that the plaintiff at this time was not suffering from any disability [295] whatever by reason of the injuries received in the accident. Plaintiff not only failed to establish by a preponderance of evidence that he is permanently partially disabled but failed to establish the fact, by any direct or certain evidence whatever; therefore, defendant contends that there is not sufficient evidence to justify the verdict returned and rendered by the jury in favor of plaintiff on his first cause of action.

(b) Plaintiff has wholly and utterly failed to establish by any sufficient evidence, whatever, "that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital services his original injuries were aggravated or that he had undergone unnecessary physical and mental suffering" which he alleges as the grounds for his recovery in the second cause of

action. While the testimony of the defendant clearly establishes that the plaintiff did receive proper and timely care and treatment for his injury and that as a result of said treatment his right clavicle is now in as good a condition as it ever was for the purpose of performing its natural functions and that if his clavicle had been fractured the union affected was above the average result of a fracture.

Third. Errors in Law committed by the Court, at the trial of said action and excepted to by the defendant as follows:

(a) The Court erred in overruling defendant's objection made at the commencement of the trial to the introduction of any testimony whatever in any manner sustaining the allegations of plaintiff's second cause of action for the reasons set forth in said motion, which are the same reasons set forth in defendant's Demurrer to plaintiff's third amended complaint heretofore filed in the case and now of record.

(b) The Court erred in denying defendant's motion made at the commencement of the trial for an order requiring the [296] plaintiff to elect on which of the two causes of action, set out in his third amended complaint, he proposed to stand for a recovery and judgment, for the reason that said two causes of action are not properly joined and should be tried in two separate suits and for the further reason, that a recovery on the first cause of action would preclude a recovery on the second cause of action and further, because a recovery on each cause of action would be a double recovery on the same

cause of action and further, because it would not be possible for a jury to determine, with any degree of certainty, what amount of pain and suffering the plaintiff underwent by reason of the matters and things set out in his second cause of action as distinguished from the natural result and consequence of the original injury described in the first cause of action.

(c) The Court erred in permitting the plaintiff to introduce any testimony whatever in support of plaintiff's second cause of action, for the reasons heretofore stated and for the further reason that by permitting such evidence to be introduced it tended to bias and prejudice the substantial rights of the defendant in regard to plaintiff's first cause of action and had the direct result of causing the jury to assess the compensation for plaintiff in his first cause of action in a much larger sum than they would have otherwise done; this is especially true in permitting plaintiff to testify that Ward Estey, an officer of defendant company, had called plaintiff a Bohunk son-of-a-bitch and told him to get out.

(d) The Court erred in denying defendant's motion at the close of plaintiff's case, to instruct the jury to return a verdict on plaintiff's second cause of action in favor of defendant and against the plaintiff, for the reasons set out in said motion, which reasons are contained in the record of the trial.
[297]

(e) The Court erred in denying defendant's motion made at the close of plaintiff's case for a nonsuit of plaintiff's second cause of action, for the

reason set forth in said motion which is now contained in the records of the trial of said action.

(f) The Court erred in sustaining plaintiff's objection to a series of questions asked Dr. Newlove, while on the stand as a witness for defendant, concerning a fractured clavicle of witness "Ells" and in sustaining plaintiff's objection to certain questions asked witness "Ells," a witness for defendant, concerning the physical result which he experienced from a fractured clavicle he had sustained, and in denying defendant the right to demonstrate to the jury by witness "Ells" that the use of his right arm and right shoulder was not impaired by reason of his right clavicle being fractured at the same point at which the plaintiff claimed his clavicle was fractured and to demonstrate to the jury that the right clavicle of witness "Ells" had been fractured and that in the union of the bone the ends at the fracture had overlapped more than one-half an inch. The reason that this testimony was relevant and pertinent is that the Court had permitted Dr. Boyle, while a witness for the plaintiff, to produce the plaintiff, remove the clothing from the upper portion of his body and shoulder and exhibit to the jury plaintiff's right clavicle and to explain to the jury that in the union of the bone there had been an overlapping of about a half-inch; Dr. Boyle having further testified that the only reason that he could assign as to why the plaintiff had not the full normal use of his right arm and shoulder was because in the union of the fractured clavicle there had been a slight overlapping of the clavicle.

(g) The Court erred in overruling the several other objections made by defendant to the introduction of testimony offered by plaintiff and in sustaining the several other objections made by plaintiff to the introduction of evidence offered [298] by the defendant, all of which more fully appears from the transcript of the proceedings of the trial.

(h) The Court erred in giving instruction No. II to the jury as the law governing any part of plaintiff's cause of action for the reason that said instruction does not correctly state the law in that the defendant had a legal right, under the facts testified to in the evidence, to require plaintiff to go to Ellamar for the purpose of an examination of his alleged injuries and for the further reason that said instruction assumes certain facts which have not been testified to and which there is no evidence to support, as follows:

“You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employ and refused him further surgical or medical care * * * the defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant's premises on defendant's order * * * and refused him further surgical and medical care * * * .”

And this erroneous assumption of the evidence would naturally tend to bias and prejudice the jury against the substantial rights of the defendant and the Court further erred in giving said instruction

No. II because it seems to apply to plaintiff's first cause of action but it covers ground entirely foreign to the first cause of action and has no bearing or relation thereto.

(i) The Court erred in giving instruction No. 14 to the jury because said instruction does not correctly state the allegations of plaintiff's pleading in regard to the arrangement between plaintiff and defendant as to the hospital contract. In plaintiff's reply he admits that during the time he was working for defendant he did not know what rights he had under the hospital arrangement other than that the defendant company maintained a temporary hospital at Ellamar to treat employees slightly injured and that defendant maintained a woman nurse at said temporary hospital, while in said instruction the Court assumes [299] that the hospital arrangement required the defendant to furnish the plaintiff with competent surgical and medical attendance at Ellamar; said instruction also contains certain phrases that do not appear either in the pleadings or the testimony in that it is assumed that plaintiff claims "that on account of the gross and wilful negligence of the defendant" the plaintiff suffered great pain and mental torture and still suffers some pain other than what was the natural result of his injury, neither the phrase mental torture or gross and wilful negligence appear either in the pleadings or the testimony; this all had a probable tendency to bias and prejudice the jury against the substantial rights of the defendant and may have caused the jury to assess the compensation against

defendant in plaintiff's second cause of action in a sum much larger than it would have otherwise done.

(j) The Court erred in giving instruction No. 16 to the jury on the ground that the same does not correctly state the law governing the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence and seems to convey the idea to the jury that the defendant under the terms of said contract was obliged to maintain at its mine at Ellamar a competent physician to pass upon the injuries of plaintiff at the time said injuries occurred and there is no testimony whatever, to bear out this assumption and this is not even claimed by the plaintiff, all of which is prejudicial to the substantial rights of the defendant and is not the law governing the case and probably created bias and prejudice against the defendant in the minds of the jury.

(k) The Court erred in giving Instruction No. 17 to the jury on the ground that the same does not correctly state the law governing the case in that the plaintiff had no lawful right to recover any sum whatever against the defendant by reason of the matters and things stated in the second cause of action for the reason it is not alleged in plaintiff's pleading or claimed [300] by the evidence that he was unskilfully treated by the defendant but it is alleged that he was not treated at all, it thereupon became plaintiff's duty to seek such treatment as he deemed proper and then by proper action he could compel defendant to pay the expenses thereof and further, said instruction did not correctly state the

law for the reason that the plaintiff would be fully compensated for all injuries he now sustains, of which the original injury was the proximate cause, in his said first cause of action and further from the testimony it would be impossible for the jury to ascertain with any degree of certainty the amount or degree of pain and suffering the plaintiff may have undergone as the natural results of his original injury as distinguished from the amount or degree he may have experienced by reason of defendant's alleged failure to give him surgical treatment. The Court further erred in giving said instruction in using the phrases "mental torture" and "malpractice" neither of which appear either in the pleadings or testimony and which tend to bias and prejudice the jury against the substantial rights of the defendant and naturally cause the jury to assess the compensation allowed plaintiff for his first cause of action at a much higher figure than they would otherwise have done.

(1) The Court erred in giving instruction No. 18 on the ground that said instruction does not correctly state the law governing this case in that it instructs the jury that they may find for the plaintiff on his second cause of action for the same matters and things alleged in his first cause of action for which he would be fully compensated should the jury find in his favor on the first cause of action and to permit the jury to find in accordance with this instruction would permit

plaintiff

the defendant to recover twice on one cause of action; said instruction is further not the law governing the

case because there was no evidence offered at the trial from which the jury could [301] ascertain with any degree of certainty the amount of damages plaintiff should recover on one cause of action and the amount that he should recover on the other cause of action and under the evidence any damages found by the jury pursuant to said Instruction, on plaintiff's second cause of action would be purely speculative and the instruction was prejudicial to the rights of the defendant also in so far as the first cause of action was concerned. This is clearly seen from the verdict of the jury in which they found for plaintiff on his second cause of action and assessed his damages at one dollar and they found for the plaintiff in his first cause of action and assessed his compensation at a figure much higher than plaintiff claimed in his pleadings, clearly showing that in assessing the compensation in the first cause of action they took into consideration the matters and things, testimony and instructions concerning the second cause of action.

(m) The Court erred in refusing to give defendant's instruction No. 6 in regard to plaintiff's second cause of action requested by the defendant to be given to the jury for the reason that the same is not covered by other instructions given by the Court, in that the other instructions do not contain that part of said instruction No. 6 informing the jury that "it must be able to determine with reasonable certainty the amount that plaintiffs original injury has been aggravated and the amount of physical and mental suffering plaintiff underwent by reason of the alleged neg-

lect on the part of the defendant separate and apart from the natural results of his original injury.”

(n) The Court erred in refusing to give defendant's instruction No. 7 in regard to plaintiff's second cause of action requested by the defendant to be given to the jury.

(o) The Court erred in refusing to give defendant's instruction No. 9 in regard to plaintiff's second cause of action [302] requested by the defendant to be given to the jury.

(p) The Court erred in refusing to give defendant's instruction No. 3 in regard to plaintiff's second cause of action on the ground that the same is not covered by other instructions given, in that, none of the other instructions contain that part of instruction No. 3, which provides that it was the duty of the plaintiff to make known to the defendant that he wanted and he needed further medical and surgical aid and unless he did make such demand of the defendant that the defendant was not liable.

(q) The Court erred in refusing to give defendant's instruction No. 4 in regard to plaintiff's second cause of action requested by the defendant to be given to the jury.

(r) The Court erred in refusing to give defendant's instruction No. 5 in regard to plaintiffs second cause of action requested by the defendant to be given to the jury.

Dated at Valdez, Alaska this 9th day of January, 1917.

DONOHUE & DIMOND,
Attorneys for Defendant.

I hereby acknowledge service of the foregoing Motion for New Trial, by receiving a copy thereof, this 9th day of January, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [303]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Minute Order Denying Motion for New Trial.

Now, on this day, this motion came on to be heard, Lyons & Ritchie appearing as attorneys for plaintiff, and Donohoe & Dimond and W. S. Bonnifield appearing as attorneys for defendant, and on behalf of motion, and after argument had, and the Court being fully advised in the premises,—

IT IS ORDERED that said motion be, and the same is hereby denied, to which order of the Court defendant excepts and exception is allowed.

September 1916 Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 106. [304]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Remittitur of Part of Verdict.

Now comes the plaintiff by his attorneys, Lyons & Ritchie, and by leave of Court does hereby remit from the verdict of the jury heretofore returned into court in this action finding for the plaintiff on his first cause of action in the sum of thirteen hundred and sixty-eight dollars (\$1368), the sum of one hundred and sixty-eight dollars (\$168), and consents that judgment may be entered upon said first cause of action in the sum of twelve hundred dollars (\$1200).

LYONS and RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [305]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Judgment.

This cause came on for trial at the September, 1916, term of the above-named court, at Valdez, Alaska, on the 4th day of January, 1917: The plaintiff appearing in person and by his attorneys, Messrs. Lyons & Ritchie, and the defendant appearing by its attorneys, Messrs. Donohoe & Dimond and W. S. Bonni-field, Esq.

A jury of twelve persons was duly empaneled and sworn to try the cause. The plaintiff introduced his evidence and rested. The defendant introduced its evidence and rested, and after argument by counsel, the Court, on the 6th day of January, 1917, gave its instructions, in writing, to the jury and thereafter, on the same day, the jury retired to consider of their verdict; and thereafter, on the 7th day of January, 1917, the jury returned into court with their verdict, whereby they found for the plaintiff on his first cause of action in the sum of \$1368 and on his second cause of action in the sum of one dollar. And the jury fur-

ther made special findings submitted to them by the Court, finding among other things under the first cause of action that the percentage of plaintiff's disability resulting from the original accident, which was the basis of said first cause of action, was 38%.

Thereafter, on the 9th day of January, 1917, defendant filed and submitted to the Court its motion for judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury, which motion was by the Court, on the same day, denied.

Defendant thereafter, and on the same day, filed and submitted [306] to the Court its motion for a new trial, which motion was, on the same day, by the Court, denied.

Thereafter, on the same day, by leave of the Court, plaintiff filed his remittitur in the cause, moving for the reduction of said verdict from the sum of \$1368 to \$1200 and consenting to the entry of judgment in the said sum of \$1200 on said first cause of action, and the Court thereupon ordered that judgment be entered for plaintiff in the sum of \$1200 on his first cause of action.

To all of the foregoing orders so made by the Court, defendant, by its attorneys, then and there excepted and the exceptions were by the Court allowed.

WHEREFORE, By virtue of the law and of the premises aforesaid, It is ORDERED AND ADJUDGED that the plaintiff, Tony Possus, do have and recover from the defendant, The Ellamar Mining Company of Alaska, the sum of \$1200 on his first cause of action, the sum of one dollar on his second

cause of action and the costs of the action, taxed at \$——.

Done in open court, at Valdez, Alaska, this 9th day of January, 1917.

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 9, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 107. [307]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Minute Order Granting Until February 15th, 1917,
to Prepare, File, and Settle Bill of Exceptions,
and Fixing Amount of Supersedeas Bond, and
Staying Execution Until Said Date.**

Now on this day, on motion of Donohoe & Dimond and W. S. Bonnifield, attorneys for defendant, Lyons & Ritchie, attorneys for plaintiff, consenting thereto,—

IT IS ORDERED that defendant have until February 15th, 1917, to prepare, file, and settle bill of ex-

ceptions in this cause, and that the supersedeas bond be fixed at the sum of \$2000, and the stay of execution is hereby granted until February 15th, 1917.

September 1916 Term—January 9th, 1917—85th Court Day—Tuesday.

Entered Court Journal No. 11, page No. 107. [308]

*In the District Court of the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Order Enlarging Time to and Including March 10,
1917, to Prepare, etc., Bill of Exceptions.**

This matter having come on for hearing before the Court on defendant's motion for an order enlarging the time within which the defendant may prepare, serve and settle its Bill of Exceptions herein upon the appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit, and the attorneys for the plaintiff, Messrs. Lyons & Ritchie being present in court and consenting thereto,—

IT IS ORDERED, that the said defendant have and is hereby granted until and including the 10th day of March, 1917, within which to prepare, file and settle its Bill of Exceptions upon such appeal.

Done at Valdez, Alaska, this 13th day of February, 1917.

By the Court:

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 13, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 128. [309]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Order Settling and Certifying Bill of Exceptions.

The above-named defendant having prepared and filed in the above-entitled court and cause its proposed bill of exceptions to be used on writ of error to the Circuit Court of Appeals for the Ninth Circuit, and having duly served the same upon the plaintiff, and the time having expired within which said plaintiff should make and file herein his objections to such bill of exceptions, and having failed to make or file herein any such objections, and it appearing to the Court that such bill of exceptions is in proper form

and contains a full, true and correct transcript of all of the papers and pleadings filed in said cause, and of all proceedings had and done therein and of all of the testimony given therein, and the court being fully advised in the premises,—

IT IS ORDERED: That the foregoing Bill of Exceptions, consisting of plaintiff's third amended complaint, defendant's demurrer to plaintiff's third amended complaint, minute order of Court overruling defendant's demurrer to plaintiff's third amended complaint, defendant's answer to plaintiff's third amended complaint, plaintiff's motion to strike parts of defendant's answer, order of court striking parts of said answer, defendant's amended answer to plaintiff's third amended complaint, plaintiff's reply, journal record of proceedings had at trial of cause, certified transcript of record and evidence at trial by the court reporter, verdict of the jury, special findings of the jury, motion of the defendant for a judgment in its favor [310] notwithstanding the verdict of the jury, minute order of the court denying motion of defendant for a judgment in its favor notwithstanding the verdict of the jury, defendant's motion for a new trial, minute order of court denying defendant's motion for a new trial, remittitur of part of verdict by the plaintiff, judgment, minute order of court granting defendant until the 15th day of February, 1917, in which to prepare, file and settle its bill of exceptions, order of court granting defendant until and including March 10, 1917, within which to prepare, file and settle its bill of exceptions, and this order settling and certifying the defendant's bill of exceptions, be,

and the same hereby is, allowed, approved and settled.

IT IS FURTHER ORDERED, that such bill of exceptions, consisting of the record, proceedings and evidence, aforesaid, constitute defendant's bill of exceptions on writ of error of said cause to the Circuit Court of Appeals for the Ninth Circuit.

AND IT IS FURTHER ORDERED, that this order be taken and considered, and is, a certificate of the undersigned judge of the above-named court that said bill of exceptions is and constitutes a full, true and correct transcript of all of the papers and pleadings filed in said cause and of all of the proceedings had and done therein and of all of the evidence given therein, necessary or material to a determination of the issues therein, or to a full understanding of the defendant's exceptions to the rulings and orders of the court therein, which said exceptions and everything concerning the same are in said bill of exceptions fully set forth.

Done, certified and signed in chambers, being the District Court for the Territory of Alaska, Third Division, on this 24th day of February, 1917, at the term of court in which the judgment given in said cause was rendered, and by the judge of said court before whom trial of said cause was had.

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 144.
[311]

*In the District Court for the Territory of Alaska,
Third Division.*

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Assignment of Errors.

Comes now Ellamar Mining Company of Alaska, the above-named defendant, plaintiff in error herein, being about to present a writ of error in that certain decision and judgment rendered, given and made on the 9th day of January, 1917, in the above-entitled court for the Territory of Alaska, Third Division, in this cause, in that certain action then pending in said court, wherein said plaintiff in error herein, was the defendant, and said defendant herein was plaintiff, and files the following assignment of errors, which it avers were committed by the Court in the proceedings filed and rendition of judgment in the said case against the defendant and appearing upon the record herein, to wit:

I.

The Court erred in making and entering its Minute Order of the 28th day of December, 1916, overruling the demurrer of defendant, Ellamar Mining Company, of Alaska, a corporation, to plaintiff's third amended complaint, to wit:

(a) By holding and deciding in said order that

it does not appear upon the face of the said third amended complaint that several causes of action have been improperly united.

(b) By holding and deciding in said order that there is not another cause of action pending between the plaintiff and defendant for the same cause set forth in the second cause of action.

(c) By holding and deciding in said order that said third amended complaint stated facts sufficient to constitute a cause of action in favor of plaintiff and against defendant, Ellamar Mining Company, of [312] Alaska, a corporation, in said action.

II.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the first paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

“that shortly after said physician and surgeon notified said plaintiff as aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant's knowledge and without making any demand whatever on the defendant for compensation for his said injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or—”

III.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plain-

tiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

"the defendant thereupon acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff positively refused and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever."

IV.

The court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from defendant's affirmative defense to plaintiff's first cause of action all of paragraph four.

V.

The Court erred in making and entering its Order on the 30th day [313] of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

"in order to better care for its employees who were slightly injured and to better administer

first aid to those who might be seriously injured.”

VI.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

“and shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter.”

VII.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the fifth paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

“and thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever.”

VIII.

The Court erred in overruling defendant's objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff's Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

(a) "Plaintiff's first cause of action, as set forth in his third amended complaint, is an action *ex delicto* and plaintiff's second cause of action is an action *ex contractu*."

(b) "Plaintiff's first cause of action, as set forth in his third amended complaint, is a special statutory proceeding and plaintiff's second cause of action is a common law action." [314]

Defendant's said objections to the reception of any testimony, and the exceptions allowed by the Court upon overruling the said objections, are set forth in pages 46 to 50 of this Record and are in words, as follows:

"Mr. DONOHOE.—At this time the defendant desires to interpose an objection to any testimony whatever being received in this trial on either of the causes of action contained in Plaintiff's Third Amended Complaint upon the ground that there are two causes of action improperly united in said complaint in this:

I. Plaintiff's first cause of action, as set forth in his third amended complaint, is an action *ex delicto*, having for its foundation an alleged tort of the defendant; and plaintiff's said second cause of action is an action *ex contractu*, the foundation of which is an alleged breach of a hospital contract between plaintiff and defendant and the allegations contained in plaintiff's said second cause of action do not bring it within the rule that would permit the plaintiff to waive his contract and sue in tort, as he nowhere alleges malfeasance on the part of the defendant

in connection with said hospital contract but does allege nonfeasance or failure on the part of defendant to perform its part of said contract.

2. Plaintiff's first cause of action as set forth in said third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, which is an act entitled 'An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all acts and parts of acts in conflict with this act.'

This act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's said second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

3. Plaintiff in his first cause of action seeks to obtain compensation for his present permanent disability under the provisions of Chapter 71 of the Session Laws of the Territory of

Alaska, for the year 1915, of which the accident occurring in the defendant's mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action plaintiff seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate [315] cause will be fully compensated in his first cause of action.

Further, the defendant demurs to plaintiff's second cause of action set forth in plaintiff's third amended complaint on the ground that there is another cause of action pending between the plaintiff and defendant for the same cause set forth in the said second cause of action, to wit: Plaintiff's first cause of action. In this cause of action plaintiff seeks to recover damages and compensation for an injury received by him in the course of his employment as a miner in the employ of the defendant and under the terms of said Chapter 71 of the Session Laws of Alaska, for the year 1915, he is entitled to be compensated for any defects he has sustained and now has, of which the original injury was the proximate cause and it is immaterial whether his alleged permanent injury was enhanced or aggravated by the lack of proper hospital treatment or not. The defendant in the first cause of action will be required to compensate the plaintiff for all injury he now sustains which grew out of the original injury set forth

in said first cause of action. To permit the plaintiff to maintain his second cause of action would be to compel the defendant to answer the same charge twice and compel the defendant to answer twice in damages for the same cause of action.

And further, defendant demurs to plaintiff's second cause of action contained in plaintiff's said third amended complaint on the ground that it does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant.

These are the same grounds I had in the demurrer and in order to preserve the record, I desire to make this objection at this time as a demurrer to the entire evidence.

By the COURT.—The objection is overruled and exception allowed.

Mr. DONOHUE.—Now I move the Court for an order requiring the plaintiff to elect on which of his two causes of action he now seeks to recover, on the theory that both causes of action are for the same thing and cannot be separated.

By the COURT.—Which motion is denied and exception allowed.”

IX.

The Court erred in overruling defendant's objection to a question asked by plaintiff's counsel which said question and objection and the exception allowed by the Court upon overruling the said objection, is set forth on pages 55 to 57 of this Record and are in words, following:

“Q. How long did he suffer any pain or handicap in the use of his jaw?

Mr. DONOHOE.—We object to that question at this time on the ground that if the evidence is applied to the first cause of action it is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action may be proven first and then the second or whether the evidence [316] will be intermingled in the two causes of action—I am at a loss to know how to proceed on it.

The COURT.—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.”

X.

The Court erred in overruling defendant's objection to any testimony being offered in any manner tending to prove the allegations of plaintiff's second cause of action contained in plaintiff's third amended complaint. Said objections being made on the grounds:

(a) “That the complaint so far as that action is concerned does not state facts sufficient to constitute a cause of action.

(b) That it commingles the two causes of action together in such a manner that the jury

will not be able to determine one from the other with any degree of certainty or definiteness.”

The said objections and the exception allowed by the Court are set forth on pages 56 and 57 of this record.

XI.

The Court erred in allowing testimony to be introduced over the objection of defendant which testimony and objections and the ruling of the Court in overruling said objection appear on page 57 of this record are in the words following:

“Q. What kind of a bandage?

Mr. DONOHOE.—We make the same objection.

Objection overruled; defendant allowed an exception.

Q. Did she put anything else on besides the bandage?

Mr. DONOHOE.—We object to that as leading.

Objection overruled; defendant allowed an exception.

Q. How long did she leave the bandage on you? A. It was taken off the next day.

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on?

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid form, was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHOE.—I have an objection and exception to all this line of testimony.

The COURT.—Yes, sir.”

XII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony and objections and the ruling of the Court appear on page 58 of this record and are in the words following:

“Q. Did anybody connected with the company, that is, any officer of the company, come to see you at [317] any time after you went into the hospital?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT.—He may answer; the objection will be overruled. Defendant allowed an exception to the ruling.”

XIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear

on pages 59 and 60 of this record and are in the words following:

“Q. What did Mr. Estey say if anything?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Mr. RITCHIE.—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT.—Mr. Interpreter, did you give the entire answer to the last question?

The INTERPRETER.—Yes, your Honor, I did.

The COURT.—That was all of his answer.

The INTERPRETER.—Yes.

By the COURT.—He may answer the question. The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled—defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign your paper you get your half pay; if you don't sign, we are going to throw you out the next day.”

XIV.

The Court erred in allowing testimony to be intro-

duced over the objection of defendant, which testimony, objection and the ruling of the Court appear on page 61 of this record and are in the following words:

“Q. Did he come there at any time afterward? [318]

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff’s testimony that Mr. Gedney had no power to bind the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception.”

XV.

The Court erred in overruling defendant’s objection to the introduction of testimony, which testimony, objection and the ruling of the Court appear on pages 62 and 63 of this record and are in the following words:

“Q. Why did you leave the bunk-house?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial and not within the issues joined by the pleadings. Objection overruled; defendant allowed an exception.”

XVI.

The Court erred in allowing plaintiff to answer a question, over the objection of defendant, which

question, objection and the ruling of the Court appear on page 64 of this record and are in the words following:

“Q. Have you given or sent anything to your mother for her support of late years?

Mr. DONOHOE.—We object to that as leading.

The COURT.—It is leading but he may answer the question.

Mr. DONOHOE.—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. RITCHIE.—I can't cover it all at once.

By the COURT.—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support.

Defendant allowed an exception to the ruling.”

XVII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 65 and 66 of this record and are in the following words:

“Q. Have you suffered any pain from your injuries? [319]

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant

and immaterial. So far as the first cause of action is concerned, it doesn't matter whether he suffered pain or not; if directed to the second cause of action, the two actions are so intermingled that it would be impossible for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the alleged other cause. Objection overruled; defendant allowed an exception.

A. He says he pains occasionally now yet from the injury.

Q. Where does he suffer pain?

Same objection; overruled; defendant allowed an exception.

A. He says right in his shoulder is the pain and he says occasionally he has pains in his head.

Q. Has he suffered pain continuously in his shoulder or only from time to time?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm then he has got a pain in his shoulder.

Q. Have you tried recently to use your arm and shoulder in any kind of work?

A. He says—no, he didn't try—it is always painful to lift his arm and his arm pains yet.

Q. Did the first few weeks after this injury did you suffer much pain or only a little?

Same objection; objection overruled; defendant allowed an exception to the ruling."

XVIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 90 and 91 of this record and are in the following words:

"Q. Why did you leave the bunk-house and go to Jim Fielders?

Mr. DONOHOE.—We object to that as repetition.

The COURT.—He may answer. Objection overruled; defendant allowed an exception.

Q. What did he say; tell him to give the exact words Mr. Estey used if he remembers?

Mr. DONOHOE.—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey.

The COURT.—He may answer. The objection will be overruled and exception allowed.

A. He said get out of here you Bohunk son-of-a-bitch—that is just what he said." [320]

XIX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 119 to 121 inclusive of this record and are in the following words:

"Q. Are you able to say and if you are able to say state, what, in your opinion is the degree

of impairment of the plaintiff's strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. DONOHOE.—To which question we object as incompetent, irrelevant and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

Mr. RITCHIE.—It applies wholly to the second cause of action. The second cause of action is based upon the claim that the earning power of the plaintiff has been impaired permanently.

By the COURT.—The objection will be overruled. The testimony of the witness will be received by the jury as applicable to the second cause of action. Defendant allowed an exception to the ruling.

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation as a laboring man.

Q. Well is he wholly disqualified at this time; that is is he utterly unable to perform his usual work, his usual vocation?

Same objection; objection overruled; defendant allowed an exception to the ruling.

A. If his vocation is that of a miner, I would say Yes—requiring the use of both of his arms.

Q. Are you of the opinion that he will be totally disqualified to follow that vocation for

the rest of his life or will he partially recover? It is only an opinion of course nobody can say positively.

A. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be.

Q. Do you think he will ever entirely recover his normal strength and flexibility in the use of that shoulder?

A. I am inclined to question whether he will."

XX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 146 and 147 of this record and are in the following words: [321]

"Q. Tell what happened there?

Mr. DONOHOE.—We object to that question on the ground that it is incompetent, irrelevant and immaterial, and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint which was stricken out on our motion in the first complaint, and goes to the question of signing a release to the company.

Objection overruled, defendant allowed an exception.

The COURT.—Who was present first and when was it? A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody's fault—it is Tony's fault himself. He said I never signed this paper because it is not my fault and Mr. Estey told him, If you not sign this paper, the Company charge you for board while you were in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the office or the store of the Company hear any conversation between Tony and either Mr. Gedney or Mr. Estey? A. No, I did not.

Q. Was that the only time you heard any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey he go and talk to Mr. Gedney.

Mr. DONOHUE.—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time as shown by the plaintiff's own testimony.

The COURT.—The last part of that answer regarding Mr. Gedney may be stricken.

XXI.

The Court erred in denying the motion of the defendant, made at the close of the plaintiff's case, to instruct the jury to return a verdict on plaintiff's second cause of action in favor of defendant and against the plaintiff, which motion, the ruling of the

Court thereon, and defendant's exception to such ruling appear at pages 152 to 155, of the record, as follows, to wit:

"Mr. DONOHUE.—Defendant at this time moves the Court to instruct the jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff, for the following reasons, to wit:

First.—Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the \$1.50 per month deducted from his wages as hospital dues, was as follows: 'He knew the defendant has a house equipped as a sort of crude hospital with a woman in charge of the same. [322] He knew nothing of any further method of caring for the injured employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment.' "

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

SECOND.—That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

THIRD.—That the evidence offered by the plaintiff in support of his second cause of action is uncertain and indefinite and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

FOURTH.—That the evidence offered by plaintiff in support of his second cause of action is uncertain and indefinite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's second cause of action would be purely speculative, as to damages, if any, sustained by plaintiff under his alleged second cause of action is entirely too

remote and uncertain to be ascertained from the evidence. [323]

FIFTH.—That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of said injuries, will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit the plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

Whereupon the jury was excused and argument had upon the above motion. The jury having returned—

By the COURT.—The motion presented by the defendant for an instructed verdict on the second cause of action will be denied and exception allowed defendant.

Mr. DONOHOE.—At this time the defendant moves that the Court grant a nonsuit against the plaintiff on his second cause of action on the same grounds presented in defendant's motion for an instructed verdict.

By the COURT.—This motion will also be denied and exception allowed.

XXII.

The Court erred in sustaining the motion and objections made by plaintiff to the questions asked George Newlove, a witness for defendant, during his direct examination while a witness on the stand in behalf of defendant; appearing at pages 247, 248 and 249 of this record in the following words:

“Q. Since you examined the plaintiff on the third day of January have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. RITCHIE.—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. DONOHOE.—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and plaintiff, side by side before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms.”

After argument by counsel the motion to strike the answer was by the Court granted and the objection [324] sustained. To which ruling of the Court counsel for defendant was allowed an exception.

“Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle there was an overlapping of the two ends of the bone?

Mr. RITCHIE.—We object to this question as to all similar questions on the ground that

Doctor Newlove qualified as an expert on this, and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something similar had not resulted in a permanent injury would be simply making all cases stand as an exception.

The objection was by the Court sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff, who had an overlapping of his right clavicle in affecting a union after a fracture?

Mr. RITCHIE.—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

XXIII.

The Court erred in sustaining the objection made by plaintiff to the questions asked Harry W. Ells, in his direct examination, while a witness on the stand in behalf of defendant, which questions, objections and ruling of the Court are in the following words:

“Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE.—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that

resulted in the fracture of the right clavicle was it before you resumed work?

Same objection.

The COURT.—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHOE.—I know, but I don't know how else I can get this into the record.

The COURT.—In order that counsel may understand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and experience. Now, it would certainly not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. DONOHOE.—No, I do not propose to do that. In the examination yesterday Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the [325] shoulder what he called a malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate positively that the overlapping of the clavicle in the union was half an inch, and then demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further propose to stand the two men up there,

side by side, so the jury could examine them and pass upon them themselves. It is a demonstration—not expert testimony—just as the plaintiff had a right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a similar or more extensive malformation, who has the full use of his arm.

The COURT.—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. RITCHIE.—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception.”

XXIV.

The Court erred in giving a part of instruction No. II as given by the Court in said cause; said part of said instruction being in words as follows:

“You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant’s premises and to control his own movements, and defendant could not thereafter require him to return for any purpose. This would be equally true if he left defendant’s premises on defendant’s order.”

—to the giving of which defendant excepted and the exception was allowed.

XXV.

The Court erred in giving instruction No. 14 as given by the Court in said cause; said instruction being in words and figures as follows:

“The Court will now direct your attention to the second cause of action set forth in plaintiff’s complaint. This cause of action is separate and distinct from plaintiff’s first cause of action and must so be considered by you.

In brief, plaintiff alleged that by virtue of an arrangement [326] existing between the defendant and plaintiff, the sum of \$1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or

illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission, and during his stay there, no competent surgical and medical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service, which aggravated the result of his original injuries as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged \$15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled."

—to the giving of which defendant duly excepted and the exception was allowed.

XXVI.

The Court erred in giving instruction No. 16 as given by the Court in said cause; said instruction being in words and figures as follows:

"You are instructed that the arrangement

whereby defendant deducted \$1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish plaintiff competent surgical and medical attendance, free of charge, for any injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded."

—to the giving of which defendant duly excepted and the exception was allowed.

XXVII.

The Court erred in giving instruction No. 17 as given by the Court in said cause; said instruction being in words as follows:

"The parties being brought into this relation above described the plaintiff may maintain an action for the [327] breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice."

—to the giving of which defendant duly excepted and exception was allowed.

XXVIII.

The Court erred in giving instruction No. 18 as given by the Court in said cause; said instruction being in words as follows:

“You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff’s original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for the plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment.”

—to the giving of which defendant duly excepted and the exception was allowed.

XXIX.

The Court erred in refusing to give instruction No. 5 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that under the compensation act, under which plaintiff’s first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such period of such refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company [328] did request the plaintiff to submit to such an examination, he is not entitled to compensation and you should consider this instruction in considering your answer to Question No. 2 herewith submitted.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXX.

The Court erred in refusing to give defendant’s

instruction No. 3 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant’s temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of February, 1916, then it was the plaintiff’s duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXI.

The Court erred in refusing to give defendant’s instruction No. 4 submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account.”

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXII.

The Court erred in refusing to give defendant's instruction No. 5 submitted to the Court, in regard to plaintiff's second cause of action, by the defendant [329] in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in this cause; said instruction being in words as follows:

“I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages; and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent

to the date that he had an opportunity to secure such other surgical and medical care.”

—to the refusal to give which the defendant duly accepted and was allowed an exception.

XXXIII.

The Court erred in refusing to give defendant's instruction No. 6, in regard to plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

“I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a pre-

ponderance of evidence, you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXIV.

The Court erred in refusing to give defendant's instruction No. 7, in regard to [330] plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in words as follows:

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

—to the refusal to give which the defendant duly excepted and was allowed an exception.

XXXV.

The Court erred in refusing to give defendant's

instruction No. 9, in regard to plaintiff's second cause of action, submitted to the Court by the defendant in said cause and requested by said defendant to be given by the Court to the jury as one of its instructions in said cause; said instruction being in the words and figures following:

“I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he notified the plaintiff and the defendant that the plaintiff had entirely recovered from his injury, and the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall; then I instruct you that the defendant was justified in relying upon the opinion so expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was the plaintiff's duty to immediately notify said defendant of this fact and to demand of defendant such further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract, and unless you find from the evidence that the plaintiff did make such a demand on the defendant and the defendant refused to comply with

such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff [331] claimed to be suffering from said injury, after he has left Ellamar, the defendant company in good faith offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you that the defendant company did all that was required of it under its hospital contract with plaintiff, and you must find for the defendant and against the plaintiff.”

—to the refusal to give which the defendant duly excepted and the exception was allowed.

XXXVI.

The Court erred in refusing to submit to the jury a form of verdict in regard to plaintiff’s second cause of action, submitted to the Court by the defendant, and requested by said defendant to be given to the jury by the Court, as one of its forms of verdict; said form of verdict being as follows, to wit:

“We, the jury, duly sworn and empaneled to try the above-entitled cause find for the defendant and against the plaintiff on plaintiff’s second cause of action set forth in his third amended complaint.”

—to the Court’s refusal to submit which, defendant duly took an exception and such exception was allowed.

XXXVII.

The Court erred in denying defendant's motion for judgment in favor of defendant notwithstanding the verdict.

XXXVIII.

The Court erred in denying defendant's motion for a new trial.

XXXIX.

The Court erred in making and entering its final judgment in this cause, made and rendered and filed by the Court herein on the 9th day of January, 1917, for the reason that the same is against the law, and is contrary to the law, and is not supported by the evidence, and is not justified by the evidence, there not being sufficient, or any, evidence to support the same; and especially for the reason that it was nowhere shown by the evidence that the plaintiff was permanently disabled, either partially or totally, and it was nowhere shown by the evidence that the defendant received a broken clavicle in the accident he sustained while in the employ of defendant; and, further, the Court erred in making and entering its final [332] judgment allowing plaintiff the sum of one dollar on his second cause of action for the reason that said second cause of action was a common law action and could not be joined with the first cause of action which was a special statutory proceeding and further the Court erred in making and entering its final judgment, allowing plaintiff one dollar on his second cause of action for the reason that said second cause of action was an action *ex contractu* and could not be joined with the first cause of action,

which was an action *ex delicto*.

XXXIX.

The Court erred in making a Minute Order on the 9th day of Jany., 1917, denying defendant's motion for a new trial in this cause.

WHEREFORE, the appellant, Ellamar Mining Company, of Alaska, a corporation, prays that the judgment of the District Court for the Territory of Alaska, Third Division, be reversed.

DONOHOE and DIMOND and
W. S. BONNIFIELD.

Attorneys for Defendant and Appellant, Ellamar Mining Company of Alaska, a Corporation.

Due and legal service, of the foregoing assignment of errors, is hereby accepted, this 16 day of February, 1917.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [333]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Petition for Writ of Error.

Comes now the above-named defendant and says: that on the 9th day of January, 1917, at Valdez, Alaska, the above-entitled court made and entered its judgment in favor of the plaintiff and against the defendant and ordering and adjudging that the plaintiff have and recover from defendant the sum of \$1200 on his first cause of action, the sum of one dollar on his second cause of action and the costs of the action taxed at \$——.

That in said judgment and in the proceedings had prior thereto certain errors were committed to the prejudice of the said defendant all of which more fully appears in the defendant's assignment of errors filed with this petition.

WHEREFORE, defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals of the Ninth Circuit for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had in the premises as may be proper therein.

DONOHUE & DIMOND and
W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

Service of the foregoing petition for writ of error, by receipt of copy thereof, acknowledged at Valdez,

Alaska, this 16th day of February, 1917.

LYONS & RITCHIE,
Attorneys for the Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 19, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [334]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 24th day of February, 1917, came the Ellamar Mining Company of Alaska, a corporation, the above-named defendant and plaintiff in error herein, by its attorneys of record. And the said defendant and plaintiff in error by its said attorneys of record filed herein and presented to the Court its petition for the allowance of a writ of error, and praying that a transcript of the records, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And at the same time and place said plaintiff in error herein presented to the Court and filed herein its assign-

ment of errors intended to be urged by it.

Now, therefore, in consideration of the premises, and the Court being fully advised in the premises;

IT IS ORDERED: That the aforesaid writ of error be, and the same hereby is, allowed upon the said defendant and plaintiff in error giving bond in the sum of two thousand dollars (\$2,000), conditioned that it will prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, said bond to act as a supersedeas on said writ of error.

AND IT IS FURTHER ORDERED: That a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Done at Valdez, Alaska, this 24th day of February, 1917.

By the Court:

CHARLES E. BUNNELL,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk.

Entered Court Journal No. 11, Page No. 146.

[335]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Ellamar Mining Company of Alaska, a corporation organized under the laws of the State of Washington, and the defendant in the above-entitled action, as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Tony Possus, the defendant in error, in the full and just sum of two thousand dollars to be paid to the said Tony Possus, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

WHEREAS, lately in the District Court for the Territory of Alaska, Third Division, in the suit pending in said court between Tony Possus, plaintiff, and said Ellamar Mining Company, of Alaska,

a corporation, defendant, a judgment was rendered against the said Ellamar Mining Company of Alaska, and the said Ellamar Mining Company of Alaska having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the [336] judgment in the aforesaid suit, and a citation directed to the said Tony Possus, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the city of San Francisco, in said circuit, on the 24th day of March, next;

NOW, the condition of the above obligation is such that if the said Ellamar Mining Company of Alaska shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and effect.

ELLAMAR MINING COMPANY OF
ALASKA.

[Seal]

By C. S. PACKER,
Its Secretary.

Sealed and delivered in the presence of
G. E. de STEIGNER,
MARYLAND CASUALTY COMPANY.

By L. J. WYCKOFF,
Its Attorney in Fact.

[Seal]

Attest: J. A. CATHART,
Its Attorney in Fact.

Approved by

CHARLES E. BUNNELL,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [337]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Writ of Error.

The President of the United States of America, to
the Honorable CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska, Greeting:

Because in the record and proceedings, as also in
the rendition of judgment, which is in the District
Court before you, between Tony Possus, the original
plaintiff and defendant in error and Ellamar Mining
Company of Alaska, a corporation, the original de-
fendant and plaintiff in error, manifest error hath
happened to the damage of the said Ellamar Min-
ing Company of Alaska, a corporation, the plaintiff
in error, as is said and appears by the petition
herein:

We being willing that the error, if any hath been,
should be duly corrected, and fully and speedy jus-

tice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under seal, distinctly and openly, send the record and proceedings aforesaid with all things concerning the same to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said circuit on the 24th day of March, 1917, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States should be done. [338]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]

ARTHUR LANG,
Clerk.

Allowed by:

CHARLES E. BUNNELL,
Judge in the District Court for the Territory of
Alaska, and the Judge Before Whom the Above-
entitled Case was Tried, and Who Rendered
Judgment Therein.

Filed in the District Court, Territory of Alaska,
Third Division. Feb. 24, 1917. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 146.
[339]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Citation on Writ of Error to Defendant in Error.

The United States of America,—ss.

The United States of America, to Tony Possus,
the Above-named Plaintiff and Defendant in
Error, and to Messrs. Lyons & Ritchie, His
Attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the clerk's office for the District Court for the Territory of Alaska, Third Division, wherein Ellamar Mining Company of Alaska, a corporation, the above-named defendant, is appellant, and you are respondent and appellee, to show cause, if any there be, why the said judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand nine hundred and seventeen.

CHARLES BUNNELL,
Judge of the District Court for the Territory of
Alaska.

[Seal]

Attest: ARTHUR LANG,
Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Feb. 24, 1917. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 11, page No. 147.
[340]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Stipulation as to What shall Constitute the Record
on Writ of Error.**

It is hereby stipulated and agreed by and between the above-named plaintiff and defendant, by their respective attorneys of record, that the hereinafter

named papers and journal entries as the same appear of record in the office of the clerk of the above-named court, shall constitute the record on the writ of error sued out by the above-named defendant, to the Circuit Court of Appeals, for the Ninth Circuit, from the final judgment made and entered in the above-entitled court and cause on the 9th day of January, 1917, to wit:

1. BILL OF EXCEPTIONS CONSISTING OF:

- (a) Plaintiff's third amended complaint;
- (b) Defendant's Demurrer to plaintiff's third amended complaint;
- (c) Minute Order of Court overruling defendant's demurrer to plaintiff's third amended complaint; said minute order being made and entered on the 28th day of December, 1916, entered Court Journal 11, page 84;
- (d) Defendant's Answer to plaintiff's third amended complaint;
- (e) Plaintiff's motion to strike parts of defendant's answer;
- (f) Defendant's answer to plaintiff's third amended complaint;
- (g) Plaintiff's reply;
- (h) Journal record of proceedings had at trial, Court Journal 11, pages 97 to 100, inclusive;
- (i) Certified transcript of record of evidence and proceedings at trial by the Court reporter;
- (j) Verdict and Special Finding of Jury;

- (k) Motion of defendant for judgment in its favor notwithstanding the Verdict of the Jury;
- (l) Minute order denying motion of defendant for judgment notwithstanding the verdict entered the 9th day of January; entered Court Journal 11, page 106;
- (m) Motion for New Trial by defendant;
- (n) Minute Order of Court denying defendant's motion for New Trial, made the 9th day of January, 1917, entered Court Journal 11, page 106;
- (o) Remittitur of part of Verdict by plaintiff;
- (p) Judgment;
- (q) Minute order of Court granting defendant until the 15th day of February, 1917, in which to prepare, file and settle its Bill of Exceptions upon appeal; said minute order being entered on the 9th day of January, 1917, in Court Journal 11, page 107; [341]
- (r) Order of Court, made and entered February 13, 1917, granting defendant until and including the 10th day of March, 1917, within which to prepare, file and settle its bill of exceptions on writ of error;
- (s) Order settling and certifying bill of exceptions on writ of error;

2. Assignment of errors;

3. Petition for writ of error;
4. Order allowing writ of error;
5. Bond on writ of error;
6. Writ of error;
7. Citation to defendant in error;
8. Stipulation as to what shall constitute record on writ of error; this stipulation;
9. Acknowledgment of service of papers on writ of error by defendant in error;
10. Certificate of Clerk of Court to transcript.

Dated at Valdez, Alaska, this 24th day of February, 1917.

LYONS & RITCHIE,

Attorneys for the Plaintiff and Defendant in Error.

DONOHOE & DIMOND and

W. S. BONNIFIELD,

Attorneys for the Defendant and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska. Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [342]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

Acknowledgment of Service of Papers on Writ of Error.

Service upon the plaintiff and defendant in error herein, Tony Possus, by the defendant and plaintiff in error, Ellamar Mining Company of Alaska, of the following named papers upon writ of error in said cause to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is hereby acknowledged, to wit:

Petition for Writ of Error, Assignment of Errors, Bond on Writ of Error, Writ of Error, Citation on Writ of Error, Stipulation as to what shall Constitute Record on Writ of Error.

And the said plaintiff and appellee hereby acknowledges receipt of copies of the foregoing papers.

Dated at Valdez, Alaska, this 24th day of February, 1917.

TONY POSSUS,
Plaintiff and Defendant in Error,
By LYONS & RITCHIE,
By JOHN LYONS,

Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 24, 1917. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [343]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 857.

TONY POSSUS,

Plaintiff,

vs.

ELLAMAR MINING COMPANY OF ALASKA,
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 347 pages of typewritten matter, consisting of pages numbered from 1 to 344, inclusive, are and constitute a full, true and correct copy of the record, the bill of exceptions, the assignment of errors, and of all proceedings in the above-entitled cause, and the original Writ of Error and original Citation issued in said cause.

This transcript is made in accordance with the stipulation between the appellant and appellee herein as to what should constitute the record in said cause upon writ of error.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and

